United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

NO. 76-1041

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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket No. 76-1041

UNITED STATES OF AMERICA,

Appellee,

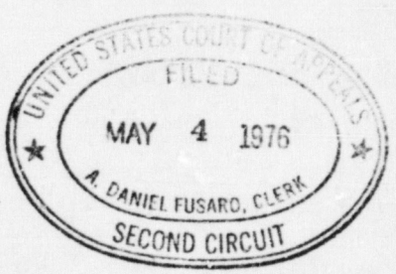
V.

DAVID GUILLETTE and
ROBERT JOOST,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JOINT BRIEF FOR THE APPELLANTS



Hubert J. Santos
Special Public Defender
51 Russ Street
Hartford, Connecticut
Attorney for David Guillette

James A. Wade
Special Public Defender
799 Main Street
Hartford, Connecticut
Attorney for Robert Joost

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STATUTES INVOLVED

Title 18, United States Code

Section 241. Conspiracy against rights of citizens

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured--
>
> They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

Section 844 (h) (1)

> Whoever--
> (1) uses an explosive to commit any felony which may be prosecuted in a court of the United States,
> * * * * * * * * * * *
> shall be sentenced to a term of imprisonment for not less than one year nore more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than five years nor more than twenty-five years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of such person or give him a probationary sentence.

Section 1503. Influencing or injuring officer, juror or witness, generally

> §1503. Influencing or injuring officer, juror or witness generally
> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any court of the United

States or before any United States magistrate or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate or other committing magistrate, in the discharge of his duty or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him or on account of his being or having been such juror, or injures any such officer, magistrate, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

QUESTIONS PRESENTED

1. Whether the Court erred in instructing the jury that the Defendants would be liable even if LaPolla accidentally blew himself up and in refusing the give the accidental death charge requested by the Defendants?

2. Whether the Court erred in refusing to give Defendants' requested alibi charge?

3. Whether the Court erred in its supplemental charge on joining a conspiracy and in failing to charge that the jury had to find that Guillette committed the acts alleged in Count I in the District of Connecticut?

4. Whether the Court erred in denying the Motion of the Defendant Joost for judgment of acquittal on the death resulting aspect of Count I and to set aside so much of the verdict as found him guilty of the death resulting aspect of Count I?

5. Whether the Court erred in excluding the hearsay testimony that Anthony Souca killed Daniel LaPolla?

6. Whether the Court erred in limiting Defendant's counsel's cross examination of William Marrapese?

7. Whether the Court erred in refusing to grant Defendant Joost a severance and in permitting the jury to hear the post-conspiratorial hearsay "confession" of the defendant Guillette and post-conspiratorial statements made by Guillette to the witness, Roger Williams?

8. Whether the Court erred in denying defendants' motion to dismiss the indictment on the ground that it was permeated with the admittedly perjurious testimony of John Anthony Housand?

9. Whether the Court erred in failing to dismiss the indictment because of the misconduct of a government agent, to wit: John A. Housand, and because of the wilful non-disclosure of Brady material by the prosecuting attorney?

10. Whether the Court erred in failing to grant the appellants' motion to set aside the verdict and to enter a judgment of acquittal?

11. Whether the Court lacked jurisdiction on Count I?

STATEMENT OF THE CASE

I. THE PROCEEDINGS TO DATE.

A. JOOST-GUILLETTE: TRIAL NO. 1

On June 14, 1973 a grand jury sitting in Hartford, Connecticut returned a three count indictment charging David Guillette, Robert Joost, William Marrapese and Nicholas Zinni, all residents of Rhode Island, with the following crimes:

Count I: That the four co-defendants did conspire, confederate and agree to deprive Daniel LaPolla of the free exercise of a right and privilege secured to him by the Constitution and laws of the United States, to wit: the right to be a witness in a court of the United States, which conspiracy resulted in the death of said Daniel LaPolla in violation of 18 U.S.C. Sec. 241.

Count II: That the four co-defendants endeavored by force and violence to influence, intimidate and impede Daniel LaPolla, a witness in a court of the United States, in violation of 18 U.S.C. Sec. 1503.

Count III: That the four co-defendants did use an explosive to commit a felony prosecutable in a court of the United States in violation of 18 U.S.C. Sec. 844 (h) (1).

The Public Defender's office was appointed to represent appellant Guillette and Attorney James Wade of the Hartford firm of Robinson, Robinson & Cole, was appointed special public defender to represent appelant Joost. The co-defendants Marrapese and Zinni were represented by private counsel. Subsequent to his initial appointment as a Federal Public Defender, Attorney Hubert Santos returned to the private practice of law and continued his

representation of appelant Guillette as a special public defender.

Bond was fixed at $100,000.00 for the defendants Guillette and Joost. They were unable to post the same and remained in custody. Marrapese and Zinni were able to post their bonds of $50,000.00 each and remained free on bail.

On October 24, 1973, after rulings and hearings on preliminary motions, the trial of appellants Guillette and Joost commenced before the United States District Court, Clarie, J. and a jury of 12 persons in Hartford, Connecticut. Prior to the commencement of this trial the court granted a motion for severance in favor of the co-defendants Marrapese and Zinni. The first trial continued until January 10, 1974 when the jury returned verdicts of guilty against both appellants on all three counts of the indictment. Motions to set aside the verdict, to arrest judgment and for a new trial were denied by the court.

On February 27, 1974 appellants filed a motion to dismiss or in the alternative for a new trial on the ground that the Government had failed to disclose Jencks Act and Brady material. The motion was denied on March 6, 1974.

On March 7, 1974 Judge Clarie imposed identical sentences on both appellants, to wit: Count I: Life imprisonment; Count II: five years imprisonment; Count III: ten years imprisonment; the latter two sentences to run concurrently with the sentence imposed in Count I. A timely notice of appeal to this court was filed by both appellants.

On March 22, 1974 these appellants filed a motion for a mistrial or to dismiss or for a voir dire examination of jurors

or for other relief as the court deemed appropriate. The ground for this motion was an affidavit filed by Thomas D. Williams, a news reporter for the Hartford Courant, wherein Mr. Williams swore that one of the jurors told him at a cocktail-dinner party in the middle of the trial, "Don't worry, we'll find those guys guilty of something." After an in chambers hearing Judge Clarie denied the motion and a timely notice of appeal was filed.

Mr. Joost began serving his sentence in the U.S. Penitentiary at Lewisburg, Pennsylvania while Mr. Guillette went to the U.S. Penitentiary at Atlanta, Georgia.

B. MARRAPESE-ZINNI: TRIAL NO. 2

On May 28, 1974 the defendants Marrapese and Zinni commenced trial for the identical charges referred to above before the United States District Court, Murphy, J. and a jury of 12 persons in Waterbury, Connecticut. The trial continued until June 12, 1974 when the jury returned a verdict of guilty as to both defendants on all counts.

After motions to set aside the verdict were denied, the defendants Marrapese and Zinni were both sentenced to life imprisonment on Count I, five years on Count II and ten years on Count III - the same sentences as were imposed on these appellants. A timely notice of appeal was filed by both Marrapese and Zinni who commenced serving their sentences at the U.S. Penitentary at Atlanta, Georgia.

C. JOOST-GUILLETTE: THE APPEAL

These appellants perfected their appeal to this court in a timely fashion, the issues being fully briefed by them and by the

Government. (See Docket Nos. 74-1333 and 74-1342 on file with this court.) Oral argument was heard by a panel of this court (Judges Lumbard, Moore and Mansfield) on October 31, 1974. No decision was rendered on this appeal due to the granting of a new trial by Judge Clarie as more fully described below.

On October 3, 1974 these appellants filed a motion for a new trial on the basis of newly discovered evidence, namely the discovery of identifiable finger prints on the explosive device utilized in the death of Daniel LaPolla. Prior to this motion being heard, John Housand recanted his trial testimony, and the new trial motion was amended claiming Housand's perjury as an additional ground for a new trial. (App. at 291-316)

D. THE RECANTATION: HOUSAND

On November 13, 1974 the Government's key witness in both of the aforementioned trials, John A. Housand, appeared before the United States Attorney for the District of Connecticut, Peter Dorsey, and in an unsworn statement recanted his trial testimony in both of the previous trials. He claimed that his testimony was perjurious, that Government agents had induced him to testify falsely in return for promises of favors, a new identity and money. He further claimed that the Government had reneged on its promise to pay him a certain sum of money.

These appellants amended their pending motion for a new trial and added as additional grounds therefor the perjurious testimony of John Housand not only on the substance of the crime itself, but also on the collateral grounds that he had wilfully perjured himself about his hospitalizations for psychiatric

reasons and about the use of a certain alias during his life of crime. The prayer for relief was also amended, seeking a dismissal of the indictment because of the perjury of a Government agent, i.e., John Housand, and the wilful nondisclosure of Brady material by the United States Attorney or in the alternative for a new trial. (App. at 291-316)

The Government indicted Housand for perjury - that is his perjury before a grand jury recanting his trial testimony, not his trial testimony. It also indicted these two appellants and five others for suborning Housand's perjury. This indictment was subsequently dismissed on the Government's own motion. It superceded that indictment with an indictment of Attorney Andrew Bucci of Providence, Rhode Island charging him with suborning Housand's perjury. That indictment has not been prosecuted.

On April 18, 1975 Judge Clarie denied the appellants' motion to dismiss the indictment against them but granted their motion for a new trial on the ground that the Government witness, John Housand, had wilfully perjured himself in failing to disclose his psychiatric background and in connection with his denial of the use of a certain alias. The court found that the Government's failure to turn over Brady material relating to Housand's psychiatric history and his use of the alias was due to negligent oversight. Due to the similarity of issues he also granted a new trial to the defendant Zinni. (App. at 317-350)

E. THE NEW WITNESS-MARRAPESE

In late December 1974 the co-defendant Marrapese was brought from Atlanta, Georgia to Philadelphia, Pennsylvania where an

interview with federal agents was arranged. Marrapese indicated to the agents that he was prepared to change his previous denial of involvement in the death of Daniel LaPolla. He was brought to Connecticut and appeared before a grand jury on January 31, 1975. He gave testimony which confirmed in broad outline the version of a conspiratorial meeting involving these defendants on May 8, 1972 given by John Housand modifying the same in respect to certain significant details. Not the least of those details was an allegation by Marrapese that his attorney, Andrew Bucci, was present at the alleged conspiratorial meeting and immediately thereafter counseled that the killing of Daniel LaPolla was the only way to get rid of him.

As a result of this allegation by Marrapese, Attorney Bucci was charged in a single count indictment with conspiring to violate the civil rights of Daniel LaPolla, which conspiracy resulted in LaPolla's death, similar to Count I above. Bucci was not charged with the substantive offenses contained in Counts II and III. His case was consolidated with those of the defendants Guillette, Joost and Zinni.

On February 20, 1975 prior to testifying at the new trial hearing of these defendants, Marrapese withdrew his appeal of his three count conviction which was then pending before this court and also withdrew his motion for a new trial which was pending before Judge Clarie.

F. GUILLETTE, JOOST, ZINNI AND BUCCI: TRIAL NO. 3

On July 28, 1975 the trial of Messrs. Guillette, Joost, Zinni and Bucci commenced before the United States District Court, Newman, J. and a jury of 12 persons in Hartford, Connecticut.

Guillette and Joost were represented by Attorneys Santos and Wade respectively. Defendant Zinni was represented by his brother, Attorney Thomas Zinni, of Boston, Massachusetts. Attorney Bucci represented himself.

The trial lasted some six weeks, with the Government's witness this time being Marrapese. Housand did not testify for the Government. Although Housand was called as a witness for the defense, he invoked his privilege against self incrimination and refused to testify. On August 5, 1975, the day before he testified in his trial, the sentence of Marrapese was reduced by Judge Murphy from life imprisonment to six years. (App. at 428-429) Both the United States Attorney who handled the new trial hearing and the U.S. Attorney handling the case in chief wrote letters in his behalf to the judge. The jury deliberated for five days and returned the following verdicts:

Defendant Guillette:

First Count: Unable to reach a verdict

Second Count: Unable to reach a verdict

Third Count: Unable to reach a verdict

Defendant Joost:

First Count: Unable to reach a verdict

Second Count: Not Guilty

Third Count: Not Guilty

Defendant Zinni:

First Count: Unable to reach a verdict

Second Count: Not Guilty

Third Count: Not Guilty

Defendant Bucci:

First Count: Not Guilty

The defendant Bucci was discharged. The defendant Zinni was released on $25,000.00 bond. The bonds of defendants Joost and Guillette were continued at $100,000.00 eacn and they remained in custody.

G. GUILLETTE, JOOST AND ZINNI: TRIAL NO. 4

On October 24, 1975, various preliminary motions having been denied, trial commenced in the United States District Court at Bridgeport, Connecticut before the Honorable Lloyd F. MacMahon of the Southern District of New York, specially assigned, and a jury of 12 persons. Once again the Government's chief witness was Marrapese. Housand again was not called as a Government witness. He was called by the defense but again refused to testify. The jury deliberated approximately a day and a half and returned the following verdicts:

Defendant Guillette:

First Count: Guilty

Second Count: Guilty

Third Count: Not Guilty

Defendant Joost:

First Count: Guilty

Defendant Zinni:

First Count: Not Guilty

The defendant Zinni was discharged. Defendants Joost and Guillette remained in custody, unable to meet the bail. Their motion to set aside the verdict was denied by Judge MacMahon on the same day as the jury returned its verdict.

On January 8, 1976 the defendant Joost was given a sentence of twenty-five years on the First Count. The defendant Guillette was given a sentence of twenty-five years on the First Count and a sentence of five years on the Second Count, which sentence was to run concurrently with that imposed on the First Count. A timely notice of appeal was filed by both defendants. They have remained in custody pending appeal.

STATEMENT OF FACTS

II. PRELIMINARY STATEMENT

Not withstanding the numerous proceedings and the complex legal issues running through this case, the essential claim by the Government is that on May 8, 1972 a meeting took place in an establishment known as Lewis Carter's Jewelery Store, attended by these defendants, whereat the death of Daniel LaPolla was plotted and an agreement to kill was entered into. Absent proof of this alleged conspiratorial meeting the Government's case against, not only these defendants, but the others who were acquitted, indeed against Mr. Marrapese himself, consists entirely of circumstantial evidence. The only direct evidence linking these defendants to the death of LaPolla is that which emanates from Marrapese's testimony about this meeting.

The salient facts about this meeting were testified to variously by Mr. Housand and Mr. Marrapese. While their versions mesh in certain respects they also differ in significant detail - to the extent that the Government chose not to indict Attorney Bucci based on the Housand version, and two different juries chose to acquit both Bucci and Zinni on the Marrapese version.

The credibility of Mr. Housand at the Trials 1 and 2 and Mr. Marrapese at Trials 3 and 4 were and are central to this case and the guilt or innocence of these two appellants. Therefore, in presenting a statement of the facts, the Housand and Marrapese versions are both set forth herein. Because the credibility of these two men, upon whom the Government has lavished favors, material rewards, and reductions of sentence are so important, it is respectfully submitted that the court should read their testimony in full, both direct and cross-examination, to get the full flavor of their claims.

III. THE GOVERNMENT'S CASE:

A. THE HOUSAND VERSION - TRIALS 1 AND 2

Daniel Lapolla, who was cooperating with federal authorities about the criminal activities of William Marrapese and Nicholas Zinni, was wired for sound and sent to engage these men in conversation about the theft of some M-16 rifles from the Westerly Rhode Island Armory. As a result of the information provided by LaPolla on May 4, 1972, these defendants along with Marrapese and Zinni were arrested in Providence, Rhode Island in the early morning in connection with the theft of the M-16 rifles and transported to Hartford, Connecticut for arraignment. John Housand, accompanied by three women, drove to Hartford to bring these defendants back to Rhode Island after arraignment.

On the return trip from Hartford according to Housand, these defendants asked him to kill Daniel LaPolla, the government informant for $5,000, to which he agreed. Housand claimed that on May 8, 1972 at approximately 10:15 to 11:00 a.m. he, in the company of Guillette, went to a meeting in the rear of Carter's

Jewerly Store in Providence, Rhode Island. Already present at this meeting when he arrived were William Marrapese, Nicholas Zinni, Robert Joost and Attorney Andrew Bucci, a Providence attorney who had represented one or more of these men on previous occasions.

According to Housand, Marrapese said "Let's get down to business." Either Joost or Guillette allegedly said "John has agreed to take care of it for five big ones." Marrapese then allegedly said "That sounded fine with him, especially since it would be split four ways." Zinni said "It sounded alright to him." Joost then looked at Attorney Bucci and said, "How's that sound to you Andy?" to which Bucci, according to Housand said, "Well its like I told you before, this LaPolla is the only man that the government has against you."

That evening according to Housand, he and Guillette went to Woonsocket, Rhode Island and met with one Eddie Sitko who gave him a .32 Colt automatic pistol with which to kill LaPolla. Housand claimed to have wiped the gun down and test fired it.

On June 13, 1972 Housand left the State of Rhode Island without having carried out his mission to kill LaPolla who was then still alive and in protective relocation. Housand was arrested on an unrelated matter in Fayetteville, Arkansas, July 15, 1972 and remained in the custody of various state authorities from that date until long after LaPolla's death on September 29, 1972.

In June of 1972 William Marrapese visited Mrs. Ann Kiely, the sister of Daniel LaPolla, inquiring about her brother's whereabouts, which she declined to give him. On September 7,

1972 Marrapese's car was seen by federal agents in Oneco, Connecticut, the town where LaPolla lived. While the occupant thereof could not be identified the car fled at a high rate of speed.

On September 23, 1972, Joost and Guillette rented a small airplane from a private pilot and flew over the Oneco area looking for a man, whom they did not locate. The next day these two hired a second plane and again flew over the Oneco area but were again unsuccessful in locating the man they were looking for.

On September 25, 1972 the Rev. Angelo LaPolla, a Catholic priest, the brother of Daniel LaPolla died of natural causes. A wake for the Rev. LaPolla was held at the rectory of the Holy Ghost Church, Providence, Rhode Island the next day. A protection detail of federal officers was assigned to the wake. Bucci and Marrapese arrived at the wake looking for LaPolla, but he was not there. Guillette and Joost later met and talked, with Marrapese and Zinni on the street in front of the rectory. The next day Guillette and Joost were observed in the cemetery where Rev. LaPolla was buried.

On September 29, 1972, Daniel LaPolla died as a result of an explosion at his home at Oneco, Connecticut. The explosion was caused by the detonation of several sticks of dynamite, which according to a government expert were rigged to explode when the front door of the house was opened. No evidence was offered as to who set this device.

On either September 29 or 30, 1972 Marrapese, Bucci, Guillette and Joost met in the cocktail lounge of the Colonial Hilton Hotel in Providence. There was no evidence of any meeting or discussion among the five.

A week after the incident at Oneco, Guillette called Mr. Roger Williams one of the pilots who had flown them in his private plane and asked that he not mention the plane ride although this request was not a threat. (See appellants' brief in docket nos. 74-1333 and 74-1342 on file with this Court for transcript references of the foregoing)

B. THE MARRAPESE VERSION - TRIALS 3 AND 4

The government's proof relating to the cooperation of Daniel LaPolla with federal officials was essentially the same as the earlier trials. Likewise the evidence about the visit to the wake and the airplane flights remained the same. Now, however, with Housand no longer available as a witness, Marrapese gave the following version of the alleged conspiracy.

In November 1971 Marrapese received a telephone call early in the moring from Guillette who told him he had some rifles he wanted to hide. Marrapese said to come to his house. He thereupon called Nick Zinni to obtain directions to Daniel LaPolla's house. Guillette and Joost arrived at Marrapese's house. They followed him in a car to Zinni's house and thence to LaPolla's house. According to Marrapese the four of them proceeded to unload the rifles from the trunk of Guillette's car and store them in LaPolla's house. Of the 30 rifles in Guillette's car, Marrapese kept one himself bringing it back to Providence. He claims he later threw it in the Providence River.

On May 4, 1972, Marrapese and the other defendants were indicted in Hartford, Connecticut and charged with the interstate transportation of stolen weapons. After arraignment in Hartford, Marrapese drove back to Providence with Attorney Andrew Bucci and Nick Zinni.

On May 8, 1972 at approximately 7:00 a.m., Marrapese drove a number of miles to Bucci's house and picked him up for a court appearance scheduled for the Providence Superior Court that day. Marrapese then drove to Zinni's house, picked him up and drove to his place of business, American Universal Gold Buyers which is at the rear of Carter's Jewelry Store to check on the results of an auction which had taken place the previous weekend at Carter's. He, Bucci and Zinni entered the rear of Carter's at approximately 8:00 a.m.

Marrapese and the others were in the store about five minutes when he looked up and saw Joost, Guillette, and Housand at the front door. He went to the front of the building, unplugged a Porta-Alarm (an electrical, automatic burglar alarm) and let the three in. They proceeded to a rear room of Carter's wherein Bucci was sitting reading a newspaper, leaving Zinni out front vacuuming the rug.

Once inside the rear room, Guillette or Joost is alleged to have said that Housand had agreed to kill LaPolla for $5,000. According to Marrapese, Guillette had agreed to obtain a "clean" weapon for the purpose of doing the job. Marrapese indicated his agreement with this arrangement. At this point, Marrapese had met Housand only once, a brief introduction at the time of the arraignment in Hartford lasting but a couple of minutes. According to Marrapese, Attorney Bucci said nothing about these plans being arranged in his presence but merely sat there reading the paper. The meeting lasted no more than fifteen to twenty minutes. Guillette departed via the front door of Carter's with Housand.

Thereupon Bucci and Zinni exited the rear door and got into Marrapese's car, Marrapese reset the Porta alarm, locked the premises and joined the other two in the car for the drive to Providence where Marrapese and Zinni had a scheduled court appearance. Once in the car, what transpired next varies at Trials 3 and 4. In Trial 3, Zinni allegedly said "What did those guys want." To which Marrapese replied, "We've hired John Housand to kill LaPolla." Zinni replied "Oh that Housand he's a good guy. He was in Atlanta with Raymond Patriarcha." Marrapese then said "Its going to cost $1,250 apiece," to which Zinni replied "That's alright with me." Marrapese claims that Bucci then said, "You fellows are crazy. You don't even know if LaPolla is the only witness the government has. You should wait until I have my law associate file some motions to see what else the government has."

In the Fourth Trial, Marrapese repeated his version of the meeting inside Carter's Jewelry Store once again leaving Zinni out in the front room vacuuming the rug. His story about the trip in the car varied, however, in that no mention of any fee arrangement or any assent thereto by Zinni was ever mentioned, only the alleged statement about Housand being in jail with Patriarcha.

Marrapese testified that he agreed with Bucci's advice to postpone killing LaPolla and immediately conveyed that advice to all of the other defendants. He said the other defendants all agreed that they would not go forward with the plan to kill LaPolla and Marrapese testified he learned that Guillette had even gotten the gun back from Housand that he had obtained for him.

Marrapese then claimed that he suggested an alternative plan to either bribe or beat up LaPolla in order to induce him not to testify against these men. He claims that the other three defendants consented to this alternative plan although he could not recall how, where or when this consent was given. None of the others agreed to contribute money toward the bribe. Marrapese said he was going to take care of that by forgiving a prior debt LaPolla had with him. He also said that he never told Attorney Bucci about the alternative plan of bribing or beating LaPolla.

Marrapese then claims that he spent the summer months of 1972 looking for LaPolla and investigating his background with an eye toward attacking his credibility at the upcoming gun trial. He claims there were several meetings with Joost and Guillette where he complained about their inactivity in preparing their defense.

He recalled a meeting at Attorney Bucci's office on September 27, 1972 attended by Bucci, Guillette, Joost and one Edward Sitko where he complained of his inability to locate LaPolla and the lack of help by the other in finding him. He claims that Bucci said "Well, if you can't go to him, let him come to you." Marrapese claims he became very upset by this remark and stormed out of the meeting.

On September 29, 1972, the date of LaPolla's death, Marrapese said he ran into Guillette and Sitko outside of Bucci's office once again. He alleges that Guillette said to him "We just left a package up there for your friend."

Marrapese then claims he began a series of meetings with various state and federal law enforcement officials in which he

denied any involvement in the death of LaPolla and told them he thought Joost and Guillette were responsible for his death. On October 6, 1972 he agreed to contact the federal agents if he came up with anything concrete about the involvement of Joost and Guillette.

In late March or early April, 1973, the day before he was hospitalized by his psychiatrist, Marrapese claims he ran into Guillette and one Edward Sitko in Armando's Restaurant in Providence. He noticed an article in the Providence Journal or the New York Daily News about letter bombs being sent through the mail and commented about same. He claims that Sitko thereupon said: "That's how we should have taken care of LaPolla." He then related how Sitko and Guillette told him in detail how they, in the company of a man named "Red", believed to be Red Houle, journeyed to Oneco, Connecticut, pried the rear window out of the house and installed an explosive device. Marrapese did not give this information to the authorities notwithstanding the fact that he was awaiting sentencing on his conviction for the interstate transportation of weapons.

On September 10-11, 1972, approximately one month before his trial dealing with the death of LaPolla, unbeknown to his attorney, Andrew Bucci, Marrapese met federal officials in Norwich, Connecticut. He gave them a 30 page statement in which he again denied his involvement in the death of LaPolla and again implicated Guillette. He told the story of the Armando's Restaurant episode, pegging the date as

April 15, 1973, a deliberately false date (a Sunday when he knew the restaurant was closed) because he said he did not trust the agents and he wanted to give Guillette an alibi at the same time he was implicating him. (See testimony of William L. Manopese, T.T. V.1, 97-237; V. 2, 5-214; V. 3, 38-43; V. 5, 65-127)

IV THE DEFENSE CASE

A. TRIAL NO. 1

The central element of the defense case at Trial Number One was a heated attack upon the credibility of John Housand, which in part consisted of an alibi defense that on May 8, 1972 from 10:00 a.m. to 12:00 noon (the time of the alleged Carter's Jewelry Store meeting) Marrapese, Zinni and Attorney Bucci were in Superior Court in Providence. A number of lawyers, a prosecuting attorney, a Rhode Island state court judge, a court clerk and stenographer were all called to support the alibi claim. In addition, the defendant Guillette presented a claim through his wife and brother-in-law, Edward Wheeler, that he was at Mr. Wheeler's home on the date and time of the May 8th meeting.

The defendants also claimed that LaPolla accidentally blew himself up and presented substantial evidence, most of which was presented at the third and fourth trials (see below), to substantiate this claim. Lastly, the defense contended that other persons against whom LaPolla was informing had him killed.

A fourth line of defense; namely that the severed co-defendant, Marrapese had LaPolla killed was blocked by certain rulings of the Court. (see defendant's brief in Docket Nos. 74-1333 and 1342 at pp. 56-61 on file with this court).

Housand's credibility was subject to attack in a number of respects. Firstly, he agreed to cooperate with the Government in return for their promises of immunity and assistance on his behalf before north Carolina parole authorities. Secondly, in

his first written statement to Government agents on April 19, 1973 Housand failed to mention the infamous May 8th meeting which was to become the cornerstone of the Government's case. Thirdly, Housand had a long criminal record and a string of aliases he had used over the years in various check cashing schemes. Finally Housand was given money, relocation, a new identity and assistance in obtaining a job and security clearance.

Unknown to the defense, the Court and the jury due to Housand's perjury was the fact that Housand had a long history of psychiatric treatment. It was in part based upon this psychiatric history that Judge Clarie granted a new trial. (App. at 317-350)

B. TRIALS NO. 3 AND 4

The defendants' case at Trials Three and Four was identical in most respects. As in Trial Number One, the defendants vigorously contended that LaPolla either accidentally detonated the dynamite bomb which killed him or that other persons against whom LaPolla was informing had him killed. However, unlike the first trial, the defendants now were allowed to introduce evidence that it was Marrapese, the new chief Government witness, who had LaPolla killed. Lastly, the defendants mounted an all-out attack on Marrapese's credibility focusing in particular on his perjurious corroboration of Housand's perjurious creation--the May 8th meeting at Carter's Jewelry Store.

1. THE ACCIDENTAL DEATH THEORY

The defendants argued to the jury that LaPolla feared the defendants as a result of the plane flights over his home on September 23 and 24, 1972 and their visits to the funeral services

of LaPolla's brother on September 26 and 27, 1972. Responding to these acts, the defendants claimed LaPolla went to his home on September 29, 1972 with the intention of setting a trap for these defendants. In the process of setting up the dynamite bomb, it accidentally detonated and killed LaPolla (Summation of Attorney Santos T.T.V. 9 at 134-135)

To support this theory the defendants presented evidence that LaPolla possessed the electrical expertise to construct and set up the device (T.T.V. 9 at 137); that LaPolla had access to dynamite (T.T.V. 9 at 137) and that the physical evidence contradicted the Government's case that LaPolla's death was caused by the opening of the front door of his Oneco, Connecticut home (T.T.V. 9 at 132-137).

2. THE "OTHER PERSON" THEORY

Although the Government tried its best to convince the jury that only the M-16 defendants had a motive to kill LaPolla, ATF Agent Smith testified that LaPolla was informing on a host of Rhode Island hoodlums including Raymond Patriarca, Antonio Lopreato, Jerry Gella and others. The defense argued that as a result of the M-16 indictment it was common knowledge in Providence that LaPolla was an informant and that any one of the persons against whom he was informing could have concluded that this was an opportune time to eliminate him. The obvious suspects in such a killing, argued the defense, would be the M-16 defendants and the real culprit would escape detection. (T.T.V. 9 at 138-139).

3. MARRAPESE HAD LAPOLLA KILLED

The defense argued vigorously that it was William Marrapese who hired a paid assasin to kill LaPolla. Evidence was presented

that Marrapese operated an illegal fencing operation known as American Universal Gold Buyers (hereinafter AUGB) which was located in the same building as Carter's Jewelry Store. The illegal fencing operation grossed by Marrapese's own admission 2.5 million for a five-year period ending in 1972. LaPolla was a frequent visitor at AUGB and was aware that Marrapese's monies were coming from illegal sources. In the summer of 1972, Marrapese was not only facing the M-16 charges but was also confronted with an IRS investigation. LaPolla's cooperation with the Government meant not only incarceration but also financial ruin. Thus, Marrapese, unlike the other defendants, had the greatest motive to kill LaPolla. (T.T.V. 9 at 168-169)

The second major piece of defense evidence used to build the "Marrapese defense" was a tape recorded conversation between LaPolla and Marrapese. This evidence was introduced against Marrapese and resulted in his conviction at Trial Number 2 before Judge Murphy. The conversation occurred on March 31, 1972 at AUGB while LaPolla was working as an informant. Marrapese told LaPolla of a plan he had to dynamite a Brooklyn, Connecticut jail to kill an informant known as Big Nose. The Court held the substance of the conversation admissible but would not admit the transcribed conversation itself. (Transcribed conversation App. at 393-396); (T.T.V. 9 at 169)

The defendants Guillette and Joost testified that it was Marrapese who convinced them to take photo flights over LaPolla's house. Marrapese conceded that he discussed the topic with the defendants but denied that he convinced the defendants to take

the flights. Guillette and Joost testified that they gave Marrapese developed photos of the flights on September 26, 1972. Marrapese claimed that he did not receive the photos until after LaPolla's death and when he did he destroyed them. The defense argued that Marrapese did in fact receive the photos on September 26, 1972 and gave them to a paid assassin. (Summation of Attorney Santos at T.T.V. 9 170-171)

The last piece of evidence related to a "Marrapese defense," the Souca story, was admitted by Judge Newman at Trial Number Three but excluded by Judge MacMahon. It was this evidence, which resulted in the not guilty and hung jury verdicts in the third trial. In January of 1973, ATF agents received information from a Government informant, whose identity remains unknown to this day to the defense, that he had a conversation with one Anthony Souca at the Crossroads Bar in the Queens on Himrod or Nimrod Street. Souca told the informant that he blew up Daniel LaPolla for William Marrapese. These facts were developed in an in camera examination of the informant by Judge Clarie at Trial Number One, which examination was subsequently transcribed. (App. at 357-366). Throughout the first trial the Government contended that the place of the conversation, the Crossroads Lounge, did not exist but a secretary for the Public Defender's office later located it. Attorney Wade journeyed to this bar and photographed it. (Affidavit of Attorney Wade, App. at 387-388)

At Trial Number Three, Judge Newman gave the Government the option of producing the informant or having the transcript of Judge Clarie's examination read. When the Government declined to produce the informant, the transcript was read. Judge MacMahon refused to follow either course and excluded the Souca evidence

entirely.

4. THE ALIBI DEFENSE

The critical date at all trials was May 8, 1972, the date of the alleged meeting at Carter's Jewelry Store. Marrapese's version put the meeting at approximately 8:00 a.m., two to three hours earlier than Housand's version. At Trials Three and Four the defendant Guillette claimed that on the date and time of the alleged meeting he was at the home of his brother-in-law, Edward Wheeler, in bed with his wife, Patricia.

5. THE CREDIBILITY OF WILLIAM LUIGI MARRAPESE

In its cross-examination of Marrapese, the defense elicited testimony that from the date of the M-16 indictment, May 4, 1972, he insisted there never was a May 8, 1972 meeting; that he had met Housand only once on May 4, 1972 for a total of thirty seconds and that he constantly fabricated stories in the hope of avoiding going to jail in the M-16 case. Marrapese admitted that the first time he told anyone that the May 8th meeting occurred was in January 1975, approximately six months after he was sentenced to life imprisionment.

From January 1972 Marrapese was treating with Dr. Frank Sullivan, a psychiatrist practicing in Cranston, Rhode Island. During the period July 1972 to October 1973, Dr. Sullivan had Marrapese hospitalized on four separate occasions for psychiatric treatment. (App. at 397-402) On the first hospitalization, Dr. Sullivan was of the view that Marrapese was losing touch with reality and in January 1973 Marrapese was hospitalized because Dr. Sullivan was of the view that paranoid thinking seemed to be developing. (App. at 397-398)

From October 6, 1972 Marrapese met frequently with ATF agents in secret and without the presence or knowledge of his lawyer. He was trying, by his own admission, to convince the agents that he had nothing to do with LaPolla's death but that Joost and Guillette committed the crime. Simultaneously, Marrapese was being prosecuted for the M-16 case and seeing Dr. Sullivan on a weekly basis. What developed out of these interlocking events is a picture of an unstable man who would tell anyone anything to avoid incarceration. Set out below is a chronological sequence of the fraud, deceit and deception of William Luigi Marrapese. (see Summation of Attorney Santos at V.9 T.T. 139-167).

May 4, 1972: Marrapese, Joost, Guillette and Zinni arrested on M-16 indictment and brought to federal building Hartford. Marrapese meets Housand for the first time outside the elevators for a period of thirty seconds.

May 8, 1972: Alleged meeting at 8:00 a.m. at Carter's Jewelry Store wherein Marrapese, Joost, Guillette, Zinni and Attorney Bucci agreed to hire John Housand for $5,000 to kill LaPolla. On the date of the alleged meeting, Carter's was protected by a burglar alarm serviced by the Guardian Gross Alarm Co. A representative of that Company, Gerald Woodall, testified that there were no records of an entry into Carter's on May 8, 1972 although there were records for entries on May 5, 6, 7 and 9, 1972. The Government contended that the alarm records were unreliable. (V.6, T.T. 145-230; V.7, T.T. 20-43)

July 1972: Marrapese meets with his psychiatrist, Dr. Sullivan. Marrapese tells his doctor that in the early 60's he

was a part of a twenty-man invasionary force into Cuba to overthrow Castro. There were only two survivors of the invasion and he was one of them. He also told a story about an intrusion into his house by federal agents with a search warrant, much to his embarassment and that of his wife and guests. Upon investigating these tales and finding them to be without any basis in fact, Dr. Sullivan hospitalized Marrapese and noted that "over the past week there had been an increase in symptoms associated with misrepresentations and difficulties in reality testing." (App. at 397)

September 29, 1972: LaPolla is killed.

October 2, 1972: Marrapese visits Dr. Sullivan, discusses LaPolla's death with him and promises to send him newspaper clippings of the incident. Marrapese tells Sullivan he is fearful that the federal authorities "might try to pull something on him."

October 6, 1972: Marrapese meets with ATF agents. He tells them that he does not know who was responsible for LaPolla's death but that he will try to find out who killed him. Asked specifically if Joost and Guillette were involved, Marrapese said he did not know. He also tells the agents that he had never seen Joost and Guillette with explosives. (At trial, Marrapese testified that he gave Guillette dynamite in February 1972.) Marrapese also told the agents he had never heard of an Edward Sitko (later he would tell the agents that Sitko, who has never been prosecuted, helped to plant the bomb) and that Zinni could not be involved in anything dishonest.

October 16, 1972: Marrapese meets again with Dr. Sullivan, discusses the LaPolla case and shows the Doctor the newspaper

clippings. Marrapese tells the Doctor that the implications point toward him in the case b[illegible]ne continues to deny involvement.

October 30, 1972: Marrapese meets again with ATF agent Petrella and Connecticut State Trooper Veillette. Marrapese told the officers that he had no real evidence to present to the authorities which could lead to the conviction of Joost and Guillette, but that he would do anything to provide the necessary information. Marrapese stated that he was unaware of any dynamite being in American Universal Gold Buyers. (At trial, Marrapese would testify that Guillette picked up dynamite in February 1972 at AUGB.)

November 2, 1972: From 10:00 - 10:45 a.m. Marrapese met with Dr. Sullivan. Sullivan concluded that Marrapese was anxious and pressured. That afternoon, Marrapese met with the agents. Again he failed to implicate Guillette or Joost. (At the trial, Marrapese would testify that in July 1972 Guillette told him that LaPolla should be dumped and on September 29, 1972, the day of LaPolla's death, Guillette told him, "I just left a package for your friend up there in Connecticut.")

November 6, 1972: Marrapese meets with Dr. Sullivan and tells him that he feels pressured.

November 8, 1972: Marrapese meets with Connecticut State Trooper Veillette and fails to inculpate Guillette or Joost.

November 9, 1972: Marrapese speaks on the phone to Trooper Veillette and failed to inculpate Joost or Guillette.

December 18, 1972: In the middle of the M-16 trial Marrapese meets with Dr. Sullivan. He tells Sullivan that he is being railroaded.

December 22, 1972: Marrapese is convicted in the M-16 case. Marrapese testified at the trial that he was not involved in the crime. At the trial of Joost and Guillette Marrapese said that his M-16 testimony was totally perjurious.

January 2, 1973: Marrapese meets with Connecticut State Troopers Veillette and Burke in an attempt to get them to assist him in receiving a light sentence in the M-16 case. Marrapese tells the troopers that the bomb which killed LaPolla was made in New York and that an individual from West Hartford, Connecticut, one Tony Volpe, was involved in the killing. (At trial, Marrapese would testify that this complete story was a fabrication.)

January 5, 1973: Dr. Sullivan again hospitalized Marrapese for the reason that "paranoid thinking seemed to be developing, but no real break with reality was noted." (App. at 398)

March 23, 1973: Marrapese claims that on this date he met Guillette and Edward Sitko, who has never been charged, at Armando's Restaurant in Providence. Marrapese claims that Guillette told him that he set up the bomb that killed LaPolla and that Sitko and "Red" Houle, who also has never been charged, assisted him. Although he was going to be sentenced in the M-16 case, Marrapese never told anyone about this alleged meeting until September 10, 1973 (see below).

March 28, 1973: Marrapese was sentenced to a three-year (a)(2) term in the M-16 case by Judge Clarie. In his remarks prior to sentencing he proclaimed his innocence both in the M-16 case and in the death of LaPolla.

June 14, 1973: Marrapese, Joost, Guillette and Zinni indicted for LaPolla's death as the result of Housand's grand jury testimony.

August - September 1973: A number of articles appeared in the New York Daily News and the Providence Journal concerning letter bombs.

September 10-11, 1973: Marrapese meets with ATF agents and Prosecutor Paul Coffey and gives them a thirty-page statement. Marrapese tells the agents that he met Housand only once, on May 4, 1972, near the elevator at the Federal Building after his release on bond in the M-16 case. Marrapese denies the existence of a May 8th meeting. Marrapese further tells the agents that on April 15, 1973 he was in Armando's Restaurant reading an article on letter bombs in the New York Daily News or Providence Journal when Guillette and Edward Sitko sat down at his table. Guillette and Sitko admitted that they along with "Red" Houle, planted the bomb which killed LaPolla. (At trial Marrapese would testify that the Armando's meeting actually occurred on March 23, 1973 and that the April 15, 1973 date, a Sunday, was a fictitious one. Marrapese testified that Armando's was not open on Sundays and that he fabricated this date to give Guillette an alibi. The defendants presented testimony at trial that no letter bomb articles appeared on March 23, 1973, but one month before Marrapese gave his thirty-page statement, a host of letter bomb articles appeared in the New York Daily News and Providence Journal. (T.T., V.6, 111-125)

October 6, 1973: Dr. Sullivan again hospitalizes Marrapese and notes that Marrapese has become "increasingly withdrawn with feelings of hopelessness, difficulties in concentrating, mixed appetite and depression." (App. at 401)

June 1974: Marrapese is convicted in the LaPolla murder case and is sentenced to life imprisonment. At sentencing Marrapese told Judge Murphy that there was no May 8th meeting.

August 1974: Marrapese is incarcerated at the Atlanta Penitentiary and meets a jailhouse lawyer by the name of Frank Klein. Marrapese asks Klein's advice on a plan he was concocting to return to Connecticut, fabricate a story to have his life sentence reduced and after he received the reduced sentence to sign an affidavit that he had lied. Marrapese wanted to know if he did this, whether the reduced sentence could be revoked and whether the persons against whom he testified would get a new trial. (T.T., V.7, 74-81

November 13, 1975: Housand recants. This evidence is excluded from the jury by Judge MacMahon.

November 1975: Marrapese sends a letter to Attorney John O'Neil, Andrew Bucci's law partner, and advises him that he has been reading cases recently dealing with recantation. Marrapese advises O'Neil that the fact that a witness recants does not mean an automatic new trial because the trial court may elect to disbelieve the recantation. (App. at 420). This evidence was excluded from the jury by Judge MacMahon.

December 17, 1974: Marrapese gives a statement to the FBI about the conversation he had with Guillette and Sitko at Armando's Restaurant and again uses the fictitious April 15, 1973 date that he used when he gave the 30 page statement on September 10-11, 1973. (App. at 424)

Marrapese further tells the agents that he paid Attorney Bucci $7,000 to bribe Housand into recanting. (At the new trial

hearing before Judge Clarie, a series of letters between Marrapese and Bucci's law partner, Mr. O'Neil, were introduced into evidence, which clearly demonstrate that the $7,000 was for an overdue legal bill due Bucci & O'Neil). (App. at 403-421) Judge MacMahon denied defendant's request to inquire into any of the foregoing.

January 1975: Marrapese appears before a grand jury and for the first time states that there was a May 8th meeting. Based on this testimony Attorney Bucci was indicted. No indictment is requested or returned against Edward Sitko or "Red" Houle.

April - May 1975: Marrapese places a number of phone calls to Attorney Bucci which were taped by his former lawyer. Marrapese asked Bucci whether he could get a new trial, how his golf game was going and whether his family was in good health. (T.T.V.2, 91-104) Incredibly, Marrapese again called Attorney Bucci the evening before he testified before Judge MacMahon! (T.T., V.2, 105)

THE COURT ERRED IN ITS CHARGE TO THE JURY IN THE FOLLOWING RESPECTS: (1) IT INSTRUCTED THE JURY THAT EVEN IF LA POLLA ACCIDENTALLY BLEW HIMSELF UP, THE DEFENDANT WOULD BE LIABLE; (2) IT REFUSED TO GIVE THE ACCIDENTAL DEATH CHARGE REQUESTED BY THE DEFENDANTS

As part of their request to charge, the defendants submitted the charge given by Judge Newman in Trial Number Three. (App. at 193-290). In preparation for the charge, Judge MacMahon held a conference in chambers to discuss the charge he intended to give and to review Judge Newman's charge. (App. 75-110).

ACCIDENTAL DEATH CHARGE

At all three trials the defendants argued that LaPolla accidentally detonated the dynamite bomb which killed him. Specifically, the defendants contended that LaPolla feared the defendants because of their plane flights over his home on September 23 and 24, 1972 and their visits to the funeral and burial services of the Rev. Angelo LaPolla on September 26 and 27, 1972. In response to these acts, argued the defendants in their summation, LaPolla decided to booby trap his home on September 29, 1972 so that any attempt by the defendants to enter his home would result in their death. It was in the process of setting up the dynamite booby trap that it accidentally detonated, killing LaPolla instantly. (Summary of Attorney Santos, V. 9, 134-135).

The defendants pressed this claim throughout the trial by its cross-examination of Government experts, Albert Gleason

(explosives), Elliot Byall (chemist), Elliot Gross (medical examiner) and Connecticut State Trooper Mulligan (explosives). (V. 9, 132-137). The defendants further emphasized in the cross-examination of ATF Agent Richard Werinoik that the accident theory was seriously entertained by Government investigators shortly after LaPolla's death. (V. 3, 143, 197-203).

Furthermore, the defendants were able to establish that LaPolla possessed the electrical expertise to construct the bomb and that in addition LaPolla had access to dynamite. All of the foregoing were emphasized in summation. (V. 9, 137).

Against this background, the defendants requested that the Court give the same accidental death charge given by Judge Newman at Trial Number Three. Judge Newman instructed the jury that if "the death were accidental, or if you are not persuaded beyond a reasonable doubt that it was deliberate the defendants cannot be found guilty of conspiracy with death resulting, although they could be found guilty of simple conspiracy." (App. at 241-242).

Judge MacMahon refused to follow Judge Newman's charge. Instead he charged the jury that even if LaPolla died accidentally the defendants would be guilty of conspiracy with death resulting if the death were induced or brought about by some act of a conspirator in furtherance of the conspiracy:

> "Death whether accidental or intentional, does not result from the conspiracy if caused by LaPolla's own act, unrelated to the conspiracy or its purposes provided the death was not induced or brought about by some act of a conspirator in furtherance of the purposes of the conspiracy. Likewise, death, whether

accidental or intentional, does not result from the conspiracy if caused by the acts of any person who was not a member of the conspiracy or even if it were caused by a member of the conspiracy but not in furtherance of its purpose or within the scope of the conspiracy." (Emphasis Supplied). (App. at 146).

At the in chambers conference to discuss the charge, defense counsel warned that such a charge would allow the jury to conclude that the defendants were guilty of conspiracy with death resulting if LaPolla set up the bomb in response to the plane rides and funeral home visits and it accidentally detonated. The Court was of the view that the defendants would be responsible if the jury accepted that series of events.

MR. SANTOS: Let's take this hypothetically, your Honor. Let's say LaPolla because of the fact that these fellows are flying over his house in a plane and are coming over to the funeral home of his brother, gets so afraid he says "I'm going to set up a bomb as a trap." and boom it goes off, which basically, is our argument. Now, would they be responsible for his death under that circumstance?

THE COURT: I think they might. If you can prove that chain of circumstances. (App. at 212-213).

At the conclusion of the charge an exception was taken to the above quoted instruction:

MR. SANTOS: I also would take exception to the Court's suggestion that accidental death induced by an act or acts of the co-conspirators would satisfy the death resulting aspect. That is the way I heard it.

THE COURT: That is the way you heard it. That was right. (App. at 148).

It is respectfully submitted that to hold these defendants liable for a subjective decision of the victim to set up a booby trap, even if that decision were induced by the acts of the

defendants in furtherance of the conspiracy, extends the concept of criminal responsibility to new limits and completely misconstrues the meaning of Section 241 of Title 18. That statute provides that an individual is subject to a penalty of life imprisonment if he conspires to deprive another of his civil rights and as a result of that conspiracy death results. Thus, the acts of the co-conspirators or their agents in furtherance of the conspiracy must cause the death. Where there is an intervening cause, i.e., the decision to set up a booby trap, fundamental logic dictates that the defendants cannot be liable.

There can be no doubt from the verdicts rendered that the foregoing charge substantially prejudiced the defense case. By their verdict of not guilty as to count three, the jury rejected the Government's claim that Guillette planted the bomb which killed LaPolla. Joost and Zinni had been acquitted of the same count at Trial Number Three before Judge Newman. Therefore it is quite possible that the jury concluded that none of the co-conspirators planted the bomb, but instead that they "scared" LaPolla into setting it up; and in that process of setting up the bomb, LaPolla accidentally detonated it, thereby causing his own death.

THE COURT ERRED IN REFUSING TO GIVE DEFENDANTS' REQUESTED ALIBI CHARGE

THE ALIBI CHARGE

The thrust of the Government's case at all three trials of these defendants was that on May 8, 1972, the defendants, Guillette and Joost, and Zinni, Marrapese, Bucci and Housand met at Carter's Jewelry Store in Cranston, Rhode Island and agreed to pay Housand $5,000.00 to kill Daniel LaPolla. The issue of whether this meeting actually occurred consumed the bulk of the non-physical evidence testimony at all four trials.

At Trials Number Three and Four the defendant Guillette claimed that on the date and time the meeting at Carter's Jewelry Store allegedly occurred he was at the home of his brother-in-law, Edward Wheeler, and in bed with his wife Patricia.* Guillette, his wife and Wheeler all testified to this effect.

The defendant Joost testified that at the time of the alleged meeting he was at home.

Based on the foregoing the defendants requested the Court to give the alibi charge given by Judge Newman. c.f. United States v. Coughlin, 514 F.2d 904 (2d Cir. 1975).

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*At Trial Number One Guillette claimed he was at Wheeler's home but not in bed because Housand, who was the key witness at Trial Number One, set the time of the meeting at 10:00 to 11:00 a.m. An alibi defense was presented at Trial Number One that Bucci, Marrapese and Zinni were all in Providence Superior Court between 10:00 and 11:00 a.m. A Rhode Island judge, prosecutor, defense attorneys, stenographer and clerk all corroborated this claim. (See defendants' joint brief in Docket Nos. 74-1333 and 1342 at pp. 56-61 on file with this Court)

Judge Newman, citing the alibi defense of Guillette and Joost, instructed the jury that "...I remind you that a defendant never has the burden of proving his innocence. If...you have a reasonable doubt as to whether a defendant was at the meeting at Carter's Jewelry Store on May 8, you must find that defendant not guilty of Count One ....". (App. at 267). Judge McMahon refused to give the written alibi request or any variation thereof.

The May 8th meeting in this case was the central issue in dispute among the parties as to Count One, the conspiracy charge. Most of the other evidence in support of the Government's case-- the visits to Oneco, the plane rides, the visit to the funeral home-- were not denied by the defendants.

The importance of the May 8th meeting was recognized by both Judge Clarie and Judge Newman.

In granting a new trial Judge Clarie said the following:

> Throughout both trials, Housand's credibility was constantly under attack. His testimony was crucial in establishing the conspiratorial meeting on May 8th, at Carter's Jewelry Store in Cranston, Rhode Island, which involved the four defendants as active participants. Without that meeting, it would have been difficult, if not impossible, to prove that all four had agreed to do away with LaPolla, as set out in Count 1 of the indictment. It became clear that the reliability of this Government-informant, as the prosecution's principal witness, could in the last analysis become finally determinative of the guilt or innocence of these defendants. (Emphasis added). (App. at 324).

At the third and fourth trials, Marrapese stepped into Housand's shoes and related in substance the same story concerning the May 8th meeting. Judge Newman, at the third trial, considered the May 8th meeting so critical that in addition to giving the aforementioned alibi charge he specifically instructed the jury "that you cannot find that the conspiracy charged in Count 1 was

formed unless you find beyond a reasonable doubt that there was a meeting on May 8 in Carter's Jewelry Store, at which an agreement was made to kill Daniel LaPolla." (App. at 260).

When an issue such as the May 8th meeting is so critical to the Government's case and so much in dispute among the parties, the real possibility exists that the jury will not believe his alibi defense. For this reason Judge McMahon was asked to follow Judge Newman's charge "...that a defendant never has the burden of proving his innocence."

The recent decision of this Circuit in United States v. Burse (2 Cir. Slip. Op. March 8, 1976, No. 75-1388) controls the issue raised herein. Like the defendant Guillette (and originally the defendant Joost), Burse was charged with a substantive offense, bank robbery, and conspiracy. As in the instant case: (1) the Government's proof in Burse rested heavily on the testimony of a co-conspirator; (2) the jury acquitted on the substantive count but convicted on the charge of conspiracy.

Burse claimed error on the ground that the trial court failed to give a requested alibi instruction. Burse had presented evidence that at the time of the robbery he was in and about his family's house.

Like Burse the defendants requested Judge MacMahon to charge the jury as follows:

> Evidence has been introduced by some of the defendants to show that on the morning of May 8, 1972, they were at a location other than Carter's jewelry store. Guillette testified he was at the home of his brother-in-law, and Joost testified he was at his own home. I remind you that a defendant never has the burden of proving his innocence. If, after considering all of the evidence, you have a

reasonable doubt as to whether a defendant was at the meeting at Carter's jewelry store on May 8, you must find that defendant not guilty of Count One, and you would not be able to use the joint venture or conspiracy theory in convicting that defendant on Counts Two or Three. (Emphasis Supplied). (App. at 267)

In reversing Judge Smith writing for himself and Judges Kaufman and Anderson said this:

> It is well established that, under proper circumstances, the jury must be given an alibi instruction when the defense so requests. United States v. Megna, 450 F.2d 511 (5th Cir. 1971); United States v. Marcus, 166 F.2d 497, 503-504 (3d Cir. 1948). The reasoning behind this rule is not difficult to appreciate. Jurors are, by definition, untrained in the specifics of the law and, accordingly, must be instructed as to the legal standards they are bound to apply. In those cases where an alibi defense is presented, there exists the danger that the failure to prove that defense will be taken by the jury as a sign of the defendant's guilt.
>
> Of course, failure to establish an alibi does not properly constitute evidence of guilt since it is the burden of the government to prove the complicity of the defendant, not the burden of defendant to establish his innocence. That, however, is a point with which we cannot expect jurors to be familiar.
>
> While jurors are apprised in general terms of the government's burden to prove each element of the charged offense beyond a reasonable doubt, this broad admonition as to the government's obligations will not suffice under circumstances such as those here. Even when the jury has been instructed as to the government's burden, there remains the danger that the effect of the attempted alibi defense will be misunderstood. Only a specific instruction can insure that this problem will not occur. Id. at 2509.

Judge Smith went on to note that courts have viewed the absence of an alibi instruction as harmless when (1) such an instruction has not been requested or (2) when the defendant's guilt has been overwhelming or (3) when the evidence in support of the alibi defense has been negligible or (4) when the defendant's presence at the scene of the crime has not been an element of the offense which the government was required to prove.

As noted, the defendants requested an alibi instruction. The Government case rested almost entirely on Marrapese's credibility, a fact that caused the jury which heard the case before Judge Newman to deliberate for 60 hours over a six day period without reaching a verdict. Judge Newman commented on Marrapese's credibility as follows in denying defendants' post trial motion to dismiss: "On the issue of Marrapese's credibility, the Court does entertain doubts about some of his testimony...". (App. at 460)

The evidence in support of the alibi defense was substantial. Guillette's brother-in-law, Edward Wheeler, testified that he drove the defendant and his wife to his residence on May 4, 1972, the day of Guillette's arrest in the M-16 case. Wheeler further testified that Guillette stayed at his residence until the morning of May 9, 1972. Wheeler testified that he could recall all of this because on May 8, 1972, the day of the alleged meeting at Carter's Jewelry Store, he picked up Guillette and his wife at about 1:00 p.m. and drove them to the offices of a Dr. Dwyer in Providence for a blood test in preparation of their marriage on May 12, 1972. The defense introduced Dr. Dwyer's appointment book and the blood test results dated May 8, 1972 from the laboratory that did the actual testing. Wheeler also testified that Guillette did not have a motor vehicle during the period May 4-8, 1972, nor was his residence equipped with a telephone. (T.T. V.6, 21-28).

Testifying to the same effect were the defendant Guillette and his wife, Patricia. (T.T. V.5, 233-252; V.7, 94-185). They too were able to recollect the dates they stayed at

Wheeler's residence because May 4, 1972 was the day Guillette was arrested on the M-16 indictment and May 8, 1972 was the date of the blood test. Both Mr. and Mrs. Guillette testified that the defendant was in bed during the morning of May 8th and not at Carter's Jewelry Store.

The defendant Joost, as we noted, testified that he was at home on the morning of May 8, 1972. Although this was the extent of Joost's alibi defense, Guillette's alibi was also critical to his case. This was so because Marrapese testified that Guillette, Joost and Housand all arrived together on the morning of May 8th at Carter's Jewelry Store. If the jury credited Guillette's alibi, Joost would reap the benefits. Likewise if the jury rejected the testimony of Wheeler and Mr. and Mrs. Guillette, Joost would be the recipient of the same adverse jury reaction which would befall Guillette. The court could have mitigated against such a reaction if it had given the requested instruction.

Judge Smith noted in the Burse decision supra that "...while Burse was acquitted on the substantive counts and while his presence at the scene of the crime was not necessary for his conspiracy conviction, the prosecution's theory of the case rested heavily on Burse's alleged presence at the scene of the robbery...". United States v. Burse, supra at 2509. As we noted above, the May 8th meeting was the cornerstone of the Government's case. It was the key issue in dispute among the parties. As Judge Claire noted in his new trial decision supra, without the May 8th meeting the Government

would have been hard pressed in establishing a prima facie case. Judge Newman thought the meeting so critical, he instructed the jury that they could not convict these defendants unless they first found the meeting had occurred.

In light of the foregoing, the instant appeal is on all fours with the Burse decision and a reversal is therefore required.

THE COURT ERRED IN ITS SUPPLEMENTAL CHARGE ON JOINING A CONSPIRACY AND IN FAILING TO CHARGE THAT THE JURY HAD TO FIND THAT GUILLETTE COMMITTED THE ACTS ALLEGED IN COUNT II IN THE DISTRICT OF CONNECTICUT

SUPPLEMENTAL CHARGE ON JOINING A CONSPIRACY

On the second day of deliberation the jury sent out a note with this question: "Is the mere unreported knowledge of a conspiracy enough to make a person a co-conspirator?". (App. at 183). The Court concluded that the jury was inquiring about the co-defendant Zinni and instructed the jury in such a manner that it conveyed to the jury the notion that it assumed a conspiracy existed and the only question was whether Zinni joined it. (App. at 9-11). An exception was taken to the charge. (App. at 18-19). Immediately thereafter, the Court recalled the jury and re-charged them. Judge MacMahon instructed the jury in part as follows:

> THE COURT: I want to add a little more to this. As I told you, you must find that there is an assent by anyone in order to find that he has become a member. You must find that he assents to this. And as I told you in the main charge, he doesn't have to say in so many words "Count me in." And as I told you a moment ago, it may be just the wink of an eye. We all have little conspiracies in our lives. Husbands and wives have them, you have them with your children. You are going to buy your wife a present, your daughter knows about it and it's a little silent conspiracy you have and winks of an eye or a smile show that you have a common understanding... . (App. at 189).

An exception was taken to this charge. (App. at 14).

To become a party to a conspiracy one must affirmatively unite oneself with the venture, make it his own and have a stake in the outcome. United States v. Freeman, 498 F.2d 569 (2d Cir. 1974); United States v. Falcone, 109 F.2d 579 (2d Cir. 1940), aff. 311 U.S. 205 (1940).

The example of conspiracies among husbands, wives and children given by Judge MacMahon conveyed to the jury the notion that one may become a member of a conspiracy by passively indicating his concurrence with the objective of the agreement. This is not the law. United States v. Edwards, 488 F.2d 1154 (5th Cir. 1974); United States v. Thomas, 468 F.2d 422 (10th Cir. 1972); cert. denied, 410 U.S. 935 (1973).

This Circuit has frowned upon the type of example noted above and has advised the trial courts that "hypothetical illustrations should be avoided because of the likelihood that they may divert the jury." United States v. Cassino, 467 F.2d 610, 619 (2d Cir. 1972); cert. denied 93 S. Ct. 957.

This type of illustration is particularly harmful to the defendants because of the claim of termination in this case. Marrapese testified that after the May 8th meeting the agreement to kill LaPolla was called off and a new agreement to assault or bribe him was made. Proof of this new agreement consisted of no more than Marrapese's testimony that at some unspecified date in May, 1972, he talked to each defendant about beating or bribing LaPolla and they agreed to the plan. In most cases Marrapese was unable to pinpoint the place of his meetings with the defendants or their words of assent. The

charge by Judge MacMahon, however, was clear and simple: all that is needed to join a conspiracy is a smile or wink of the eye. Within an hour of the supplemental charge the jury returned its verdict of guilty. (App. at 14-15).

OBSTRUCTION OF JUSTICE CHARGE

In Count Two of the indictment the defendant Guillette was charged with obstruction of justice (18 U.S. 1503) in the District of Connecticut on September 29, 1972. (App. at 72). Count Three charged Guillette with using a dynamite bomb in the District of Connecticut on September 29, 1972. (App. at 73). Guillette was convicted of Count Two but acquitted of Count Three. At Trial Number Three before Judge Newman, the Government conceded, out of the presence of the jury, that the same act was contemplated in Court Two and Three, namely, the use of a dynamite bomb to blow up LaPolla.

At Trial Number Three Judge Newman advised the jury that Count Two alleged that the obstruction of justice occurred in the District of Connecticut. (App. at 232). Judge MacMahon refused to similarly advise the jury and an exception was taken. (App. at 156).

The only acts allegedly committed by Guillette in Connecticut were the motorcycle t ips to Oneco in the summer of 1972, the plane rides on September 23 and 24, 1972 and according to Marrapese the planting of the dynamite bomb. The jury rejected the claim that Guillette planted the bomb by acquitting him on Count Three. Obviously the motorcycle and

plane trips cannot constitute obstruction of justice because there is no evidence that Guillette endeavored by force and violence to influence, intimidate or impede LaPolla in order to prevent him from being a witness in the M-16 case on these occasions. For this reason the defendant Joost who accompanied Guillette on the motorcycle and plane rides was acquitted of Counts Two and Three at Trial Number Three before Judge Newman.

By failing to advise the jury that Count Two allegedly occurred in Connecticut, the jury may have concluded that the visits to the funeral home and burial site on September 26 and 27, 1972, in Providence, Rhode Island, constituted the obstruction of justice. There was evidence that Attorney Bucci, an alleged co-conspirator, forced his way into the funeral services for the Rev. Angelo LaPolla for the purpose of locating Daniel LaPolla. Bucci was accompanied by Marrapese and later joined by Joost and Guillette. The next day Joost and Guillette were detained by Providence police after they witnessed the funeral procession for Rev. LaPolla pass by.

Absent the instruction requested by the defendants the jury may well have concluded that it was these acts in the District of Rhode Island which constituted the obstruction of justice.

THE COURT ERRED IN DENYING THE MOTION OF DEFENDANT JOOST FOR JUDGMENT OF ACQUITTAL ON THE DEATH RESULTING ASPECT OF COUNT I AND TO SET ASIDE SO MUCH OF THE VERDICT AS FOUND HIM GUILTY OF THE DEATH RESULTING ASPECT OF COUNT I

At Trial No. 3 the defendant Joost was charged with the same three counts as the defendant Guillette. The jury in that trial found him not guilty of Counts II and III, i.e. the substantive offenses of intimidating a witness by force and violence and using a dynamite bomb to commit a felony. Prior to Trial No. 4 Joost asked the Court to dismiss so much of Count I as charged him with the death resulting aspect of the underlying conspiracy on the ground that to make him proceed to trial on that aspect violated the Double Jeopardy Clause of the Fourteenth Amendment in light of his acquittals on the substantive offenses. That motion was denied. (App. at 478-479)

At the conclusion of the Government's case in chief Joost moved for judgment of acquittal on the death resulting aspect of Count I on Double Jeopardy grounds. At the conclusion of all the evidence he again moved for judgment of acquittal on the grounds of Double Jeopardy and collateral estoppel. (T.T. V. 8, 81) Both motions were denied. Significantly, however, Judge MacMahon was troubled by this claim saying that it was one that he had struggled with labeling the same a "substantial argument" (App. at 110)

Collateral estoppel prohibits the trial of an ultimate issue of fact before a second tribunal that has previously been determined by a valid and final judgment. Ashe v. Swenson, 397 U.S. 436, 443 (1970). The concept is embodied in the Fifth Amendment guarantee

against double jeopardy, Id. at 445, and is designed to protect a defendant from having to "run the gauntlet" of a trial a second time. Green v. United States, 335 U.S. 184, 190 (1957). It is a concept that applies with equal merit in the criminal law as in the civil sphere. United States v. Oppenheimer, 242 U. S. 85, 88 (1916).

This Circuit has adopted the rule that "the Double Jeopardy Clause of the Fifth Amendment includes within its doctrinal scope the principle of collateral estoppel. Thus a defendant in a criminal case cannot be convicted on the basis of an issue of ultimate fact which has been determined in the defendant's favor in a prior criminal proceeding involving the same parties". United States v. Tramunti, 500 F. 2d 1334, 1346 (2d Cir. 1974). The burden is on the appellant to show that the verdict in a prior trial necessarily decided the issues now in litigation. Id. at p. 1346. See also United States v. Friedland, 391 F. 2d 378, 382 (2d Cir. 1968). Appellant Joost respectfully submits that because he was retried on the very same indictment in Trial No. 4 as in Trial No. 3 this case uniquely raises the collateral estoppel issue.

In the three most recent examinations of collateral estoppel by this Court either different crimes or different statutes were involved. Tramunti, supra and United States v. Gugliaro, 501 F. 2d 68 (2d Cir. 1974) both involved convictions for making false declarations before a Court which declarations were made at a prior trial for conspiracy, mail fraud and stock fraud. The argument that the issue of the appellant's false declarations had been resolved in the earlier trial by their acquittal on some

counts was rejected by the court on the ground that the jury did not necessarily find they had not been lying about an alleged meeting. Those cases clearly raise separate substantive issues not directly before the jury in the earlier trials.

In United States v. Cala, 521 F. 2d 605 (2d Cir. 1975) the appellant was tried and acquitted in California for violating 18 U.S.C. §472 which prohibits the possession of counterfeit currency. He was subsequently indicted and convicted of violating 18 U.S.C. §473 and conspiring to do so in violation of 18 U.S.C. §371. This Court found that there was a difference in the crimes charged and that the evidence introduced at the two trials related to different time periods.

More nearly in point is United States ex rel Rogers v. La Vallee, F.2d, (2d Cir., Slip Opinion, May 15, 1975) wherein the jury was hung on the charge of kidnapping in the first degree, death resulting, but acquitted the defendant of kidnapping, second degree. In holding that the double jeopardy clause barred a second trial because the jury's verdict of acquittal on the lesser charge had necessarily encompassed the greater offense, this court expressly said that the jury's confusion did not vitiate the rule of collateral estoppel, saying:

> The difficulty with the district court's point of view, however, is that it rests on the proposition that "viewing the verdict herein as an entity and as a whole, I cannot find that the jury herein necessarily acquitted petitioner of kidnapping 2d degree." In fact, however, the jury did just that, however erroneously and no matter how confused. The verdict was an express acquittal of kidnapping in the second degree. It was rendered without correction by the trial court and without objection to the inconsistency by the prosecution. Under Ashe v. Swenson, 397 U.S. 436, 445 (1970), where it appears that the jury's verdict in the prior trial necessarily decided the issues raised in the second prosecution, collateral estoppel is constitutionally operative, embodied in the guarantee against double jeopardy. (Id. at p. 3556-3557).

In the present case not only was the crime charged identical to that in the earlier trial (the same indictment was used) but the evidence came in as though it were being played back on a video tape recorder. In Trial No. 3 the government's claim was that Joost, Guillette, Marrapese, Zinni and Bucci all conspired to violate LaPolla's civil rights and that this conspiracy resulted in his death. The evidence purported to show that Guillette had electrical expertise in preparing and placing a dynamite bomb. The Government's claim was that Joost and Guillette actually placed the bomb in LaPolla's house. It is noteworthy that the government did not choose to indict Bucci for the substantive offenses of intimidating the witness or planting the bomb. As to Guillette, in addition to the evidence of his electrical expertise, the government introduced evidence of his "confession" to Marrapese at Armando's Restaurant that he actually did it.

The jury in Trial No. 3 was hung on the substantive count of planting the bomb and intimidating the witness insofar as Guillette was concerned but it acquitted Joost of these two counts. The jury rejected the claim that Joost actually planted the bomb. Yet no other evidence of a conspiracy "resulting in the death" of LaPolla was offered by the government at either Trial No. 3 or Trial No. 4.

18 United States Code, §241 is unique in that the substantive offense itself carries with it a maximum prison term of ten years. The "death resulting" aspect does not alter the substantive nature of the offense but merely increases the penalty--to life imprisonment. It is much like a recidivist statute which permits a greater penalty upon proof of multiple convictions.

In Trial No. 3 it was the Government's contention that although there was no direct evidence tying Joost to the planting of the bomb or the intimidation of LaPolla through force and violence, the jury could find him guilty of these substantive offenses if it found that he was a joint venturer with any of the other co-conspirators. The Government asked for and received a charge on the theory of joint venture. (See Judge Newman's charge; App. at 232-240) The court advised the jury and the Government so argued that the substantive acts charged in Counts II and III were the actual planting of the dynamite bomb at LaPolla's door. Therefore in the posture that the case went to the jury, in Trial No. 3, the defendant Joost was acquitted of being an actual perpetrator of the crime.

Having been acquitted of the substantive offenses, Joost should never have been required to go to trial with Guillette on the death resulting aspect of Count I. An appropriate motion to dismiss that aspect of the case was made prior to Trial No. 4. He reiterated that claim in his motion to sever and in his motion for judgment of acquittal. After the verdict he asked the court to set aside so much of the verdict as convicted him of the resulting death of LaPolla. All of these motions were to no avail.

In examining the evidence against Joost it is clear that the conspiracy proven (i.e., the hiring of Housand to kill LaPolla) did not result in his death since Housand never fulfilled his "contract". The Government offered no other evidence tying Joost to the death. Even assuming Marrapese's tale of the "confession" at Armando's Restaurant to be true, that activity in no way involved Joost.

Appellant Joost should never have been required to go to trial with Appellant Guillette on the death resulting aspect of Count I. The entire structure of both the goverment's case as well as his own defense would have been different had his trial been severed. But once the joint trial went forward the Court should not have let the jury rule on the death resulting aspect of Count I insofar as Joost was concerned. It was error not to direct a verdict of acquittal on that aspect or to set aside that portion of the verdict.

THE COURT ERRED IN EXCLUDING HEARSAY TESTIMONY THAT ANTHONY SOUCA KILLED DANIEL LAPOLLA

On the first day of Trial Number One of these defendants, October 23, 1973, the Government made a disclosure pursuant to Brady v. Maryland, 373 U.S. 83 (1963) that in January 1973 a government informant had a conversation with one Anthony Souca in a bar on Nimrod Street in New York City.[1] Souca told the informant that he killed Daniel LaPolla for William Marrapese by blowing him up. (App. at 360). The Government further disclosed that Souca could not be found although it was later learned that practically nothing was done to find or verify the existence of Souca (See affidavit of Mr. Coffey, App. at 353). The late disclosure on the eve of the first trial foreclosed any hope that the defendants could find Souca. Furthermore, the Government objected to the disclosure of the name or identity of the informant and would not allow him to be interviewed by the defense. Judge Clarie, however, agreed to examine the informant in camera and a partial transcript of that examination was given to defense counsel. (App. at 357-366)

Judge Clarie ruled that the Souca admission to the informant was hearsay and therefore inadmissible. He refused to admit the hearsay as an admission against penal or pecuniary interest.

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[1]The informant related that the bar was known as the Crossroads Lounge and was near, not on, Nimrod or Himrod Street in Queens. Nearby, were railroad tracks. All of these details were later verified by defense counsel. The bar itself, the street name and the railroad tracks were photographed. (See photos infra at .)

At the second trial of these defendants before Judge Newman, the defendants again pressed their request that the Government disclose the identity of the Souca informant and that he be required to testify.

The defendants cited Rule 804(3) of the Federal Rules of Evidence which had become effective after the commencement of the second trial:

> (3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Judge Newman offered the Government the option of producing the informant or letting the defense offer the transcript of the informant's testimony. The Government declined. Thereafter, Judge Newman admitted a more complete transcript of the in camera interview of the informant by Judge Clarie. This more complete transcript was not disclosed to the defense until Judge Newman held it admissible. (App. at 367-386)

At Trial Number Four before Judge MacMahon, these defendants again moved for the identity of the Souca informant, and for his production and testimony or, in the alternative, for the admissibility of the Souca transcript. The defendants again relied upon Rule 804(3). Judge MacMahon denied all such defense requests. (App. at 393-396)

At all three trials, the defense contended that it was the alleged co-conspirator William Marrapese who had LaPolla killed. It was the defendants' claim that Marrapese had the greatest motive to kill LaPolla because of a pending income tax investigation which would financially ruin Marrapese if LaPolla decided to disclose what he knew of Marrapese's illegal fencing operation. In addition, Marrapese, who grossed by his own admission, 2.5 million per year at the fencing operation had the resources to hire a paid killer. The defense also introduced evidence that Marrapese discussed the dynamiting of a local Connecticut jail with LaPolla while LaPolla recorded the conversation. The dynamiting discussion revealed that Marrapese wanted to blow up the jail in order to eliminate a police informant known as Big Nose.

Now that the Supreme Court has decided Chambers v. Mississippi, 410 U.S. 284 (1973) and Rule 804 (3) has been adopted it is clear that admissions against penal interest are admissible in federal courts if: (a) the admission has sufficient indicia of reliability; and (2) the admission is a critical part of the defense case.

The petitioner in Chambers appealed his Mississippi state murder conviction on the ground that two common law evidentiary rules prevented him from receiving a fair trial. Petitioner, Leon Chambers, was tried by a jury and convicted of murdering a policeman. Shortly after the murder, Gable McDonald, gave a sworn statement to Chambers' attorneys that he killed the policeman.

In addition McDonald told three friends shortly after the killing that he committed the crime. Prior to trial at a preliminary hearing McDonald repudiated his prior sworn confession and testified that he was persuaded to confess to the crime by a friend who promised that he would share in the proceeds of a lawsuit that Chambers would bring for false arrest and prosecution.

At trial Chambers called McDonald as a witness and introduced as an exhibit his confession. The state, upon cross-examination elicited from McDonald the fact that he had rejected his prior confession. At the conclusion of cross-examination, the defense attempted to examine McDonald as an adverse witness. The trial court held, however, that because it called him as its witness, the defense was vouching for his credibility.

Blocked by this ruling, the defense next attempted to call as witnesses the three friends to whom McDonald admitted committing the murder. The trial court held inadmissible McDonald's admissions on the ground that they constituted hearsay. Mississippi has refused to recognize admissions against penal interest as an exception to the hearsay rule. This refusal to admit McDonald's admissions coupled with Mississippi's voucher rule denied petitioner, said Mr. Justice Powell for the Court, a fair trial.

In arriving at this result the Court made it clear that admissions against penal interest will be admissible if there is sufficient evidence of their reliability. The Court found McDonald's statements reliable for four reasons: (1) each of McDonald's confessions were made spontaneously to a close acquaintance shortly after the murder had occurred; (2) each

confession was corroborated by some evidence in the case; (3) the sheer number of four independent confessions; (4) each confession was self-incriminatory and unquestionably against interest; (5) McDonald presence in the courtroom. See, also, Commonwealth v. Hackett, 307 A.2d 334 (Pa. Super 1973)

At all three trials the defense argued that the Souca admission that he killed Daniel LaPolla similarly carried sufficient indicia of reliability: (1) the admission was self-incriminatory and unquestionably against interest; (2) the admission was made to a Government informant and not to a defense witness; (3) the admission if believed by the jury could further implicate the appellants in the conspiracy to kill LaPolla. This is so because Souca told the informant that he killed LaPolla for William Marrapese. If the jury found a conspiracy among Marrapese and the appellants, they would be bound by Marrapese's acts in furtherance thereof; (4) the informant did not want to testify because he feared the defendants.[2] This is not a case then where the defendants call a cooperating witness to perjure himself for their benefit.

There is another strong indicia of reliability in this case. Based on the in-chambers examination of the informant and the affidavits filed by the prosecutor, it is clear that the Crossroads Lounge is located in the Borough of Queens (App. at 358) near, not on, (App. 359) Nimrod or Himrod Street (App. at 355). Near the lounge, according to the informant,

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[2]Although the Government contended that the Souca informant feared these defendants, no substantive evidence in support of this claim was ever offered. It is difficult to believe that the informant feared these defendants since his testimony helped them. If he had a reason to fear anyone it was Marrapese.

were railroad tracks (App. at 373). Although the Government said it was unable to locate the Crossroads Lounge, subsequent to the first trial a secretary for the Public Defender's Office, located a Crossroads Lounge near Himrod Street in Queens. On June 7, 1974, James A. Wade, court appointed counsel for appellant Joost, drove to the area and located the Crossroads Lounge at 53-57 Metropolitan Avenue, Queens, New York. Metropolitan Avenue is a street which intersects with and is approximately three blocks west of Himrod Street. Four blocks north of the Crossroads Lounge, counsel for Joost located a railroad crossing. Attorney Wade photographed the intersecting street sign of Himrod Street and Metropolitan Avenue, the Crossroads Lounge and the railroad crossing. (See affidavit of James A. Wade, Esq., App. at p. 387-88).

In addition to all of this, a new piece of evidence tending to demonstrate the reliability of the Souca statement was revealed for the first time to the defense and the prosecutor at the third trial before Judge MacMahon. Connecticut State Police Trooper Raymond Veillette testified that in January 1973, 10 months prior to the disclosure of the Souca admission to the defense, Marrapese told him that that person who killed LaPolla could be found at a bar in New York. Arrangements were subsequently made to travel with Marrapese to the bar but Marrapese never kept the appointment with the officer. The state trooper never advised the prosecuting attorney, Mr. Coffey, of the conversation with Marrapese until he testified at the third trial, November 3, 1975. (T.T., V. 6, 73-75)

The same month and year that Marrapese disclosed the above to the state police officer, the Souca informant revealed the

Crossroads Bar conversation to federal agents who apparently were unaware of Marrapese's disclosure to state trooper Veillette.

The Government will no doubt argue that unlike McDonald in the Chambers case supra Souca was not present to be called at trial and that Souca could not be found. It is submitted that the Government must share full responsibility for this situation. Prior to the first trial the defendants made repeated demands for any information the Government had which would indicate someone other than the appellants, Joost and Guilette, killed Daniel LaPolla or the names of any other suspects they may have in connection with the killing. The Government prosecutor admitted that there were other suspects but that anything they may have done was done with the defendants. On the first day of the first trial, October 23, 1973 the Government handed to the defense the following eleven line Brady disclosure.

That disclosure reads as follows:

RESPONSE TO THE UNITED STATES TO THE DEFENDANT'S MOTION TO DISCLOSURE OF INFORMATION UNDER BRADY v. MARYLAND

> In January, 1973, A.T.F. agents attempted to pursue a lead to determine if an individual by the name of Anthony Souca had any involvement in the LaPolla murder. The lead, in the form of a rumor supplied by an informant, was to the effect that an Anthony Souca had been involved with one of the defendants, William Marrapese, in a discussion about the elimination of a witness in Connecticut. No details were provided except that an alleged conversation on an unknown date occurred in a bar on or near Nimrod Street, between Souca and Marrapese. Attempts by A.T.F. agents from January, 1973 to date have failed to locate, show the existence of an individual named Anthony Souca or of a bar answering the description on Nimrod Street. No further information was developed with respect to this lead.

It was obvious therefore that the Government received the Souca information in January, 1973 but never disclosed it to the

defense until October 23, 1973. The Government claimed in the disclosure that it was making an effort to track down the Souca information and that no details were supplied by the informant except that an alleged conversation on an unknown date occurred in a bar on or near Nimrod Street, between Souca and Marrapese.

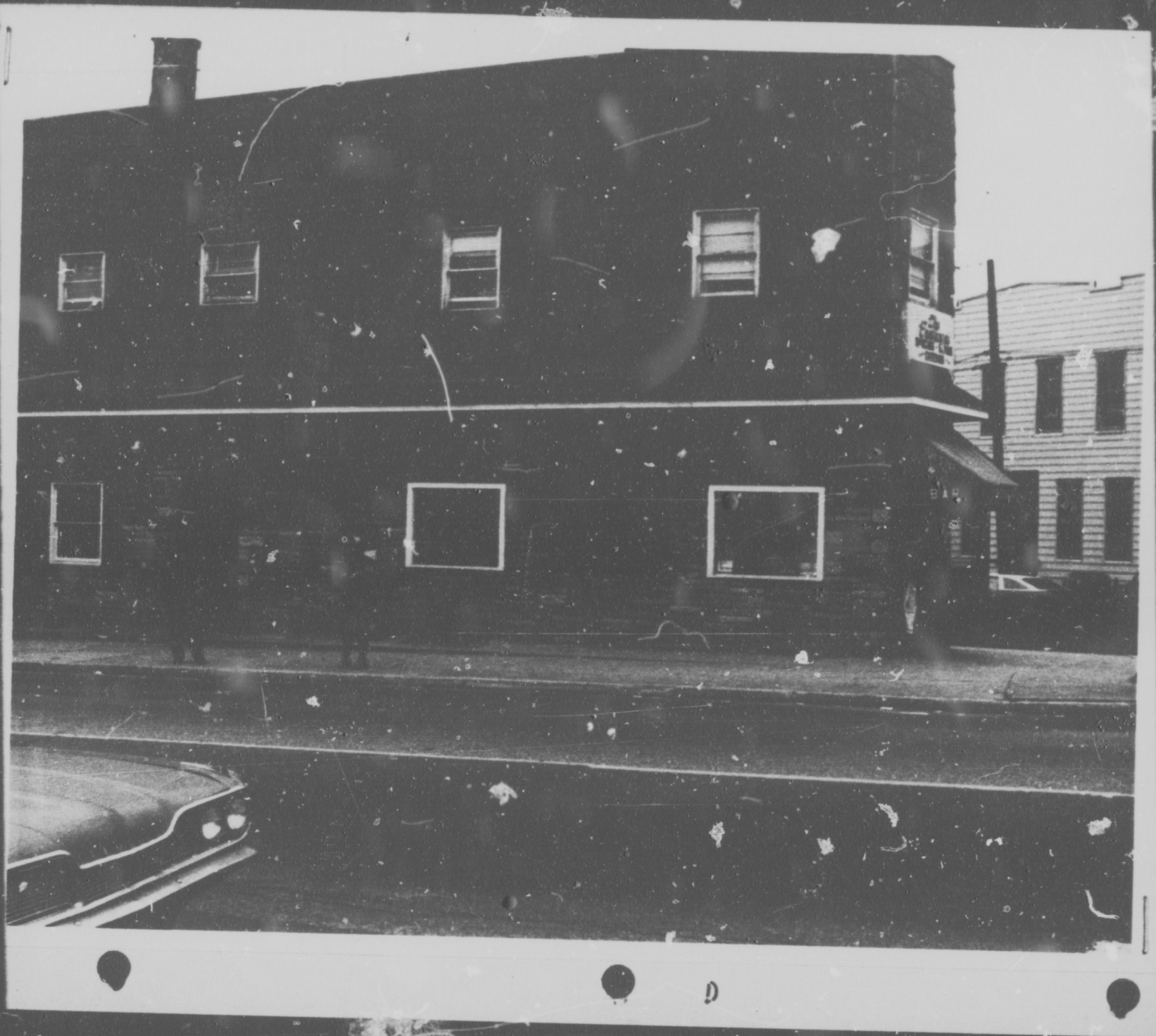
However, when the informant was examined in camera by Judge Clarie in December, 1973 at the Defendant's request, he did supply details. He told Judge Clarie under oath that he met Souca at a nightclub in New York City; that the nightclub was named the Crossroads or something similar; that it was on or near Nimrod Street in Queens; that he talked to Souca two times; that Souca told him his occupation was demolition and firearms; that Souca told the informant that he blew up LaPolla for Marrapese by planting an explosive at LaPolla's front door; that he would recognize a photograph of Souca if he saw it. Thus this sworn testimony conflicts with the Government's Brady disclosure quoted above that "no details were provided (by the informant) except that an alleged conversation on an unknown date occurred in a bar on or near Nimrod Street, between Souca and Marrapese."

After receiving this information in January, 1973 the Government not only failed to disclose it to the defense but did virtually nothing to verify the accuracy of the information. At the insistence of Judge Clarie at the first trial the prosecutor filed an affidavit setting forth what steps it took to locate the bar on or near Nimrod Street or to find Souca. In its affidavit, the Government disclosed that the only thing that "ATF Agent John Petta, Queens, New York, checked with New York City police and neighborhood sources in attempting to determine the identity of Anthony Souca and/or the names of bars on 'Nimrod Street'."

This was the extent of the Government's investigation as of December 26, 1973, eight days before the defense rested its case at the first trial (App. at 353).

After the defense protested that the Government was doing virtually nothing to find Souca, the prosecutor in his affidavit stated: "On December 26, 1973, a new investigation was opened to locate Anthony Souca. All bars or restaurants bearing a name similar to 'Crossroads' on or near Nimrod or Himrod Street in New York City (Queens) are being checked. ...Once the bar is identified or located, a surveillance will be placed upon it to attempt to locate Souca." (App. at 355)

Was the informant brought to Queens and asked to locate the bar? NO! Had the Government disclosed this information to the defense shortly after indictment or had it conducted a minimum investigation before December 26, 1973 Anthony Souca might have been found and available at trial. If this were so, there is no doubt that the admission against penal interest would have been held admissible. The defense should not be penalized for Souca's absence because of the failure of the Government to promptly disclose the information or to vigorously investigate the leads supplied by the informant.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The Court Erred In Limiting Defense Counsel's Cross-Examination of William Marrapese

Near the conclusion of his cross-examination of Marrapese counsel for defendant Guillette submitted a written offer of proof regarding additional cross-examination of Marrapese. (App. at 430-433). An in chambers conference was held on the offer. (T.T.V.3, 3-27) Judge MacMahon was of the view that the proposed line of inquiry was material but excluded it on the ground that it was a supplemental defense attack on Marrapese's credibility. (T.T., V.3, 26) This exclusion constituted an abuse of discretion and infringed upon defendants' Sixth Amendment right of confrontation.

The thrust of the defendants' offer was a claim that Marrapese lied about the existence of a May 8th meeting and conspiring with Attorneys Bucci, O'Neil and Guillette to purchase Housand's recantation. Marrapese lied, claimed the defendants, because he knew Housand's recantation did not mean an automatic new trial and that the only way to have his life sentence reduced was to fabricate crimes and events that did not exist so that he would become a valuable Government witness.

The facts the defendants wished to establish in order to lay the foundation for the foregoing argument were testified to at the new trial hearing before Judge Clarie or at the third trial before Judge Newman and are as follows:

1. From the date of his indictment on June 14, 1973 until January 1975 Marrapese denied the existence of the May 8th

meeting. This fact was in evidence.

2. On September 10-11, 1973 Marrapese met with ATF agents and Strike Force Attorney Paul E. Coffey without the knowledge of his attorney. Marrapese gave the agents and Mr. Coffey a 30 page statement wherein he stated that he met Housand only once on May 4, 1972, the date of his arrest on the M-16 case, at the Federal Building in Hartford. Marrapese denied the existence of a May 8th meeting. These facts were in evidence.

3. About one month after he gave the 30 page statement and on the eve of Trial Number One he discussed the 30 page statement with his attorney, Andrew Bucci. On the back page of the statement Marrapese wrote in his own hand that Prosecutor Coffey did not believe him. This fact was established at Trial Numbers Three and Four. (T.T. V.2, 71).

4. Marrapese was convicted in June 1974. The chief Government witness at his trial was John Housand who testified that there was a meeting at Carter's Jewelry Store on May 8, 1972 between 10:00 and 11:00 a.m. whereat Marrapese, Zinni, Guillette, Joost and Bucci were allegedly present. At that meeting it was agreed to pay Housand $5,000.00 to kill LaPolla.

At his own trial Marrapese introduced evidence through a Rhode Island state judge, a prosecutor, defense attorneys, a court stenographer and clerk that on May 8th between 10:00 and 11:00 a.m. he, Zinni and Attorney Bucci were in Providence Superior Court.

All of the foregoing was excluded by Judge MacMahon.

5. In June 1974 Marrapese was sentenced to life imprisonment and at sentencing Marrapese told Judge Murphy that there was no May 8th meeting. This fact was in evidence.

6. In August 1974 Marrapese was incarcerated at the Federal Penitentiary, Atlanta. While there he met a jailhouse lawyer by the name of Frank Klein. Marrapese told Klein that if he were given the opportunity he had a plan to return to Connecticut and fabricate a story that would get his sentence reduced. Thereafter he planned to recant. Marrapese asked Klein if he did this whether the Government could nullify his reduced sentence and whether the persons against whom he testified would get a new trial.

These facts were in evidence. (T.T., V. 7, 79-80)

7. On November 13, 1974 Housand appeared before U.S. Attorney Peter Dorsey and recanted his trial testimony. This fact was excluded by Judge MacMahon.

8. On November 17, 1974, four days after the recantation Marrapese wrote a letter to Attorney John O'Neil, Bucci's law partner. In that letter, which is reproduced in the Appendix (App. at 420), Marrapese wrote:

> "In regard to our talk about J. Housand, this must be proven beyond his word. There is a fellow here who went before Murphy on the same motion in "61" proof is needed beone (sic) his word. One case you may look up in a 1972 case 2nd circuit Percico v. U.S. it came down in December, 1972 it is in the Federal 2nd it would be a case against us. There has been a lot of cases of this in New York . . ." (App. at 420)

On November 25, 1974 Attorney O'Neil wrote back to Marrapese:

"You're on the ball! I had read the Plisico* case. For your information, it is 339 F. Supp. 1077 and it was decided by Judge Travia. Your second letter prompted a special visit to the library when I found that Franezee case about 1/2 hour before receiving your letter. Both these cases are greatly distinguishable from the current matter for reasons I will explain later..." (App. at 421)

This evidence was excluded by Judge MacMahon. Had it been admitted, the defendants would have argued that Marrapese concluded Housand's recantation did not mean an automatic new trial.

9. In December 1974 federal authorities commenced an investigation into Housand's recantation. On December 4, 1974 Marrapese was subpoenaed before a grand jury and invoked his fifth amendment privilege. This was fact not in evidence.

10. On December 17 and 18, 1974 Marrapese met with FBI agents investigating the recantation and told them that he, Bucci, O'Neil and Guillette conspired to purchase Housand's recantation. Specifically Marrapese told the FBI he gave O'Neil $7,000.00 on November 18, 1974 to pay off Housand. (App. at 423).

This evidence was excluded by Judge MacMahon. Had it been admitted the defendants would have argued that the investigation of the recantation gave Marrapese an opportunity to become an important witness for the Government and to put into effect the plan he discussed with Frank Klein at the Atlanta Penitentiary. Since he questioned whether a new trial would be granted based solely on the recantation he took a calculated risk and fabricated

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*The reference is apparently to United States v. Persico, Jr., 339 F. Supp. 1077 (E.D.N.Y. 1972).

the story that he paid Housand to recant. The fact of the matter is that the $7,000.00 paid O'Neil on November 18, 1974 represented an overdue legal fee. A series of letters between Marrapese and O'Neil from May 1, 1974 to November 10, 1974 clearly establish this fact. These letters were introduced at the new trial hearing before Judge Clarie and are reproduced in our appendix. (App. at 403-421) Defense counsel attempted to have them marked as a court exhibit in connection with his offer of proof but Judge MacMahon refused to allow the marking. (T.T. V.2, 226-227) After the verdicts of guilty, Judge MacMahon changed his position and accepted the letters as court exhibits. (T.T., V. 11, 60-61) The Court is urged to read the letters. They firmly establish that the $7,000.00 represented a legal fee.

11. On January 31, 1975 Marrapese appeared before a grand jury and for the first time testified that there was a May 8th meeting.

Had all of the foregoing facts been admitted into evidence the defense would have argued in summation that Housand's recantation on November 13, 1974 gave Marrapese the opportunity to put the plan he discussed with Frank Klein at the Atlanta Penitentiary into effect. As his letter of November 17, 1974 to Attorney O'Neil amply demonstrates, Marrapese was concerned that Housand's recantation would not lead to a new trial. Marrapese

knew that the federal authorities were inquiring into whether Housand's recantation was corruptly obtained because he was subpoenaed before the grand jury conducting the investigation on December 4, 1974. Marrapese thereafter made a calculated decision to put his plan into effect, to wit: to tell the F.B.I. that he, Bucci, O'Neil and Guillette corruptly obtained Housand's recantation and that he paid O'Neil $7,000.00 for this purpose on November 17, 1974. This was clearly a lie, the defense would have argued, because letters between Marrapese and O'Neil from May 1, 1974 to November 10, 1974 demonstrate beyond any question that the $7,000.00 was paid for an overdue legal bill.*

Once Marrapese concocted this story he had to explain why he purchased the recantation. The obvious answer was because Housand was telling the truth about the May 8th meeting. Marrapese knew full well that Mr. Coffey, the prosecutor, would not believe him unless he corroborated Housand on the May 8th meeting. Marrapese knew this because of his experience with Coffey when he gave the thirty page statement on September 10-11, 1973. At that time Mr. Coffey told Marrapese he did not believe his disclaimer of the May 8th meeting. However, Marrapese had one problem with corroborating Housand's version of the meeting because Housand set the meeting

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*The Government was not aware of these letters until Mr. O'Neil produced them at the new trial hearing before Judge Clarie. By that time, Marrapese had already told a grand jury of the conspiracy to purchase Housand's recantation.

at between 10:00 and 11:00 a.m. At that time Marrapese was in Providence Superior Court. As a result, Marrapese moved the time of the meeting from 10:00 a.m. to 8:00 a.m.

Most if not all of these facts could have been developed through the cross-examination of Marrapese and the introduction of the letters. In fact most of the elements of the above argument were in evidence except for the following:

(1) Housand's recantation on November 13, 1974;

(2) Marrapese's appearance before the grand jury investigating the recantation on December 4, 1974 and his invocation of the fifth amendment;

(3) Marrapese's December 17, 1974 statement to the F.B.I. that he paid Attorney O'Neil $7,000.00 to corruptly obtain the recantation;

(4) Housand's claim that the May 8th meeting occurred at 10:00 - 11:00 a.m. and Marrapese's defense that he was in court at these times.

The development of the foregoing facts would have consumed thirty minutes of testimony. There was no need for a protracted proceeding. In fact when the defense made the offer of proof, it agreed to any limitation the court thought appropriate. (T.T., V.3 22-23, 25)

The appellants recognize that the trial court is vested with broad discretion in controlling cross-examination. It is also recognized that the rule in this Circuit is that "a party may not cross-examine a witness on collateral matters in order to show that he is generally unworthy of belief and may not introduce extrinsic evidence for that purpose...."

United States v. Haggett, 438 F.2d 396, 399 (2d Cir. 1971); United States v. Lester, 248 F. 2d 329, 334 (2d Cir. 1957) However "a party is not so limited (in cross-examination) in showing that a witness had a motive to falsify the testimony he had given." Id. at 399 The bias or interest of a witness is not a collateral issue, and extrinsic evidence is admissible thereon. Id. at 399; also see United States v. Blackwood, 456 F.2d 526 (2d Cir. 1972)

Without William Marrapese the Government would not have had a case. The defendants should have been given the broadest latitude to develop their claim of why and how he fabricated the May 8th meeting. There can be no dispute that Marrapese was subject to searching cross-examination as to prior perjury, inconsistent statements and his hope for a reduced sentence. However the area the defendants desired to explore involved the process by which Marrapese came up with the date and time for the May meeting at Carter's Jewelry Store. It was not an attempt, as was the case in United States v. Turcotte, 515 F.2d 145 (2d Cir. 1975), to again rehash the claim that Marrapese was a liar and perjurer. By restricting the cross-examination the Court prevented the defense from explaining how the May 8th date and the 8:00 a.m. meeting time emerged.

Had the jury known for example, that Housand claimed the meeting was at 10:00 a.m. but that Marrapese claimed that he was in court at that time, the jury would have understood why Marrapese set the time for the meeting at 8:00 a.m. Had the

jury known of Marrapese's letter to Attorney O'Neil that Housand's recantation did not mean an automatic new trial, the jury would have understood why Marrapese created the story about bribing Housand. Why would a person who paid $7,000.00 to purchase a recantation, blow the whistle on the plot, when its objective was accomplished? Marrapese's discussions with Frank Klein at Atlanta would have made more sense to the jury, if they were aware of the letters between O'Neil and Marrapese and Marrapese's claim that he paid O'Neil $7,000.00 to obtain Housand's recantation.

What the Supreme Court had to say about the limits of cross-examination in Davis v. Alaska, 415 U.S. 308 (1974) is particularly applicable here:

> We cannot speculate as to whether the jury as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided "a crucial link in the proof...of petitioner's act." Id. at 317

THE COURT ERRED IN REFUSING TO GRANT DEFENDANT JOOST A SEVERANCE AND IN PERMITTING THE JURY TO HEAR THE POST CONSPIRATORIAL HEARSAY "CONFESSION" OF THE DEFENDANT GUILLETTE AND POST CONSPIRATORIAL STATEMENTS BY GUILLETTE TO THE WITNESS ROGER WILLIAMS

The defense was apprised of the fact that Marrapese would testify to a conversation which allegedly took place in late March or April, 1973, some six to seven months after the death of Daniel LaPolla, in Armando's Restaurant in Providence, Rhode Island. According to Marapese he ran into David Guillette and Edward Sitko at this restaurant. The defendant Joost was not present. He claims that he was reading an article on the front page of the Providence Journal or the New York Daily News* about letter bombs and idly inquired how they worked. Sitko allegedly replied "That's the way we should have killed LaPolla". It is then claimed that Guillette and Sitko proceeded to explain in detail how they, in the company of a man believed to be "Red" Houle, went to the LaPolla residence at night, removed the rear windows and planted the bomb. (T.T. V.2, pp. 6-7).

Forewarned of this line of testimony the defendant, Joost moved prior to trial to sever his case from that of Guillette on the ground that such testimony constituted inadmissible hearsay, insofar as he was concerned. This motion was denied. During the trial the prosecuting attorney advised the court and the defense

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*The Providence Journal and The New York Daily News were checked for articles about letter bombs in this time period. There were none. However, interestingly enough, there was a whole series of articles about letter bombs in both of these papers in August of 1973 some 2-3 weeks before Marapese first gave this story to the A.T.F. Agents.

of his intention to examine Mr. Marrapese about the alleged Armando's Restaurant conversation. The defendant Joost objected on the ground that as to him this conversation was hearsay and was an inadmissible post-conspiratorial statement made by a codefendant. The objection was overruled. Just as the prosecutor was about to go into the conversation the court instructed the jury as follows:

> The Court: I want to say to the jury that this conversation that you are about to hear can only be considered about the defendant Guilliette. You may not consider it against either of the other defendants. Proceed. (T.T. V.2, pp.6).

The prosecutor then elicited the conversation, after which the defendant Joost again moved to sever his case. That motion was denied. No further instruction was given to the jury about how it should treat this testimony. Attorney Santos, during his cross-examination of Marrapese, delved into the Armando's Restaurant incident at depth. Affirmative relative evidence was introduced by Mr. Santos through Ms. Holly Fitzsimmons, a law student working in Attorney Wade's office, to show that no letter bomb stories appeared in the Providence Journal or The New York Daily News at or about the time of the alleged incident. A considerable amount of testimony was elicited about the built-in false date and the fact that Marrapese used the same date when he claimed to be coming clean with the FBI.

In its final charge to the jury the court gave the following instruction to the jury:

> Now in the determination of guilt or innocence you must bear in mind that guilt is personal. There is no such thing in our system as guilt by mere association. The guilt or innocence of each Defendant must be determined separately with respect to him solely on the evidence presented against him or on lack of evidence. You will recall that during the trial certain evidence

> such as Marrapese's testimony about Guillette's statements to him in Armando's Restaurant in March of 1973 was admitted for your consideration only as to Guillette, but not as to the other Defendants. You should consider evidence which has been so limited as to the one defendant in determining the guilt or innocence of that Defendant. But you must disregard such limited evidence in determining the guilt or innocence of the other Defendants. (Appendix pp. 127).

There can be no doubt that insofar as the defendant Joost was concerned, the alleged conversation at Armando's Restaurant constituted hearsay evidence. United States vs. Pacelli, 491 F. 2d 1108, 1115-1118 (2d Cir. 1974). Since the alleged conspiracy had itself ended on September 29, 1972 the statements of Guillette could not be offered as the declaration of a co-conspirator made in the course of the conspiracy. See e.g. Lutwack v. United States, 344 U.S. 604, 619 (1952). The statements attributed to Sitko, of course, could not even be called the statement of a co-conspirator since he was not indicted with any of these defendants.

What seems to be present here is the very type of hearsay declared to be inadmissable by the Supreme Court in Krulewitch v. United States 336 U.S. 440 (1949) and Bruton v. United States 391 U.S. 123 (1968). Appellant Joost respectfully submits that in no way was the Armando's Restaurant conversation admissible as to him and yet the impact of an alleged "confession" by a co-defendant was bound to have a significant spillover effect on him.

In Trial No. 3 before Judge Newman, this conversation was allowed in on the government's theory that although it could not come in as the statement of a co-conspirator, since Joost was charged with the substantive offenses of intimidating a witness

and using a dynamite bomb to commit a felony the statement might be admissible against him as evidence of a joint venture with Guillette. That was the theory upon which the Government urged its admissibility and upon which it was admitted. However, in Trial No. 4 Joost was no longer charged with those substantive offenses, having been acquitted of same by the jury in Trial No. 3. The only charge against him was conspiracy.

It is further submitted that the Court's instructions on this subject were both inadequate and inappropriate. They were inadequate in that they did not fully explain to the jury the subtle process of accepting certain evidence against one defendant and disregarding it as to another. The instructions given at the time of the testimony were nothing more than a slogan. By reiterating the conversation in the concluding charge, the court did nothing more than highlight the problem rather than curing it. When it is remembered that this jury panel was brand new for this case and had had no overall jury instructions the inadequacy of the charge as given is even more apparent.

Having been fully forewarned of the problem the Court should have permitted Joost to sever his case from that of Guillette. Had he been tried separately not only would an alleged "confession" never come before the jury but a significant amount of cross examination and rebuttal evidence on the subject would have been eliminated. It is respectfully submitted that the effect of this "confession" on the defendant Joost's case cannot be ignored.

Similarly the statements attributed to Guillette by the witness Roger Williams were inadmissible as to Joost. When

Williams testified that Guillette called him up a couple of days after LaPolla died and told him not to say anything about having taken him flying in Connecticut, the government once again was offering a post conspiratorial hearsay statement by a codefendant which had obvious prejudicial effects on the totality of the trial. Had Joost been tried alone, this testimony would never have been admitted. To permit it to come into a closely contested joint trial was error.

THE COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS THE INDICTMENT ON THE GROUND THAT IT WAS PERMEATED WITH THE ADMITTEDLY PERJURIOUS TESTIMONY OF JOHN ANTHONY HOUSAND

The Defendants were indicted in June of 1973. (App. at 71). That indictment was based upon the testimony of John Anthony Housand. Housand told the grand jurors of a meeting at Carter's Jewelry Store in Cranston, Rhode Island wherein David Guillette, Robert Joost, Nicholas Zinni, William Marrapese and Attorney Andrew Bucci agreed to pay him $5,000.00 to kill Daniel LaPolla. Housand reaffirmed his grand jury testimony before Judge Clarie and a jury at the first trial of Guillette and Joost. That testimony resulted in the conviction of the defendants and a sentence of life imprisonment.

On November 13, 1974, Housand returned to Connecticut and appeared before U.S. Attorney Peter Dorsey. Housand told Dorsey that his trial testimony was false and that he was forced into giving the testimony by the threats and promises of Federal ATF agents and prosecutors.

In December of 1974, Housand appeared before a grand jury convened to investigate his recantation. Housand repeated the recantation he gave to U.S. Attorney Dorsey. Thereafter, the Defendants filed an Amended Motion for a New Trial and Dismissal of the Indictment. (App. at 219)

On April 14, 1975, Judge Clarie granted a new trial and denied defendants' Motion for Dismissal. In his ruling, Judge Clarie noted that Housand perjured himself in material respects

at the trial:

> The Count finds that informant Housand's trial testimony, to the effect that he had never asked for or received psychiatric evaluation or treatment was completely false. (App. at 327).

The second trial of these defendants was assigned to Judge Newman. Prior to trial defendants moved to dismiss the indictment on the ground that it was based on the perjurious testimony of John Anthony Housand. (App. at 434). Judge Newman ruled that Judge Clarie rejected this claim by refusing to dismiss the indictment and that ruling was the law of the case.

After the second trial resulted in a hung jury, Defendants filed a post-trial motion pursuant to Rule 29(c) for judgment of acquittal and dismissal of the indictment. (App. at 448-455). The Defendants argued that after Housand recanted it was the prosecutor's duty to advise the grand jury of the new development and to call the Government's new witness, Marrapese, before the grand jury for the purpose of seeking a new indictment untainted by Housand's perjury. The defendants argued that the failure of the prosecutor to seek a new indictment was inexcusable in light of the fact that Housand testified before a grand jury in December of 1974 and repeated his recantation. Marrapese appeared before the same body in January 1975 and inculpated the defendants. Thus all the relevant testimony necessary for a new indictment was under oath and in transcript form. Nevertheless, the Government refused to re-indict and instead relied upon the June 14, 1973 indictment.

Judge Newman denied defendant's post-trial motion and again cited Judge Clarie's ruling as the law of the case. (App. at 458).

The third trial was assigned to Judge Lloyd F. MacMahon who was specially assigned to hear the matter. Again, the defendants moved to dismiss the June 14, 1973 indictment on the ground that it was based upon Housand's perjury. (App. at 440-441). In addition, the defense also argued that a dismissal order should enter because Housand's psychiatric history was not revealed to the grand jury. The motion was denied.

There are two leading cases on grand jury perjury. Remarkably one of the cases involves the same prosecutor who represented the Government in the instant case.

In United States v. Gallo, 394 F. Supp. 310 (D.Conn. 1975), the chief Government witness, Buckley, appeared before a grand jury and related what he know about an illegal gambling business and a meeting in Easton, Connecticut, wherein the Defendant Gallo met with others to centralize gambling operations. Thereafter, Buckley reappeared before the same grand jury and admitted that his story about the Easton meeting was fabricated, but reaffirmed the rest of his story concerning Gallo's illegal gambling activities. The grand jury indicted Gallo. However, due to technical deficiencies that indictment was dismissed. Thereafter the prosecutor convened a new grand jury and submitted to its members the transcripts of Buckley's prior testimony.

The District Court, Zampano, J., dismissed the indictment for two reasons:

> First, the prosecutor should have told the grand jurors they were entitled to hear live testimony from Buckley and

> Second, the prosecutor failed to alert the second grand jury that the transcripts upon which it was to base an indictment were permeated with perjurious statements as to crucial, material events***the Defendants cannot be permitted to stand trial on an indictment which to the Government's knowledge may have been founded on perjured testimony. See United States v. Basurto, 497 F.2d 781, 785-787 (9 Cir. 1974) Id at 315.

A case more directly in point is United States v. Basurto, 497 F. 2d 781 (9th Cir. 1974). In that case, one Barron was the key grand jury witness. Prior to the commencement of trial Barron informed the Assistant U.S. Attorney prosecuting the case that he had committed perjury before the grand jury in important respects. The prosecutor failed to advise the court or grand jury of Barron's perjurious grand jury testimony but did advise opposing counsel. In reversing the conviction the Court found: (1) Barron's grand jury perjury was material; (2) Jeopardy had not attached at the time the prosecutor learned of the perjured testimony, nor had the statute of limitations for the offenses charged run. The Court was of the view that upon learning of the perjury it was incumbent on the prosecutor to dismiss the indictment and then to re-indict the defendant. Id at 785.

At the point at which the Government learned of the perjury before the grand jury, the prosecuting attorney was under a duty to notify the court and the grand jury, to correct the cancer of injustice that had become apparent to him. To permit the appellants to stand trial when the prosecutor knew of the perjury before the grand jury only allowed the cancer to grow. Id at 785.

The Government will not dispute that Housand was the central grand jury witness. His testimony concerning the May 8, 1972 meeting at Carter's Jewelry Store formed the basis for the conspiracy

charge in Count One of the indictment. Indeed it was the only direct evidence relating to the alleged conspiracy. Without Housand, the prosecutor would not have sought nor received an indictment against these defendants. Judge Clarie, in ordering a new trial recognized the materiality of Housand's testimony:

> Throughout both trials, Housand's credibility was constantly under attack. His testimony was crucial in establishing the conspiratorial meeting on May 8, 1972, at Carter's Jewelry Store in Cranston, Rhode Island, which involved the four defendants as active participants. Without that meeting, it would have been difficult, if not impossible, to prove that all four had agreed to actively participate in carrying out the plan to do away with LaPolla, as set out in Count I of the indictment. It became clear that the reliability of this Goverment-informant, as the prosecution's principal witness, could in the last analysis become finally determinative of the guilt or innocence of these defendants. (Emphasis added) (App. at 324)

Jeopardy Had Not Attached

After Judge Clarie granted the new trial the prosecutor had ample time to seek an untainted indictment. In fact, the testimony had been completed for that purpose. Housand recanted before the grand jury in December 1974 and Marrapese testified in January 1975. Judge Clarie did not order a new trial until April 18, 1975 and the second trial did not commence until the end of July 28, 1975. The third trial commenced on October 24, 1975. Before and after both trials the defense implored the prosecutor ad nauseaum to seek a new indictment and to advise the grand jurors of Housand's recantation.

In United States v. Estepa, 471 F. 2d 1132 (2d Cir. 1972), this Court condemned the casual attitude with respect to the presentation of evidence to a grand jury. The prosecutor in this case, who only two months before the start of the trial before

Judge Newman had been rebuked by Judge Zampano in the Gallo case, supra, for not advising a grand jury of perjurious testimony, again ignored the admonitions of defense counsel, the District Court and this Court.

The same sanction that was imposed by this Court in Estepa must be applied here. Had defense counsel not warned the prosecutor that failure to re-indict would result in complications on appeal, this Court might be more sympathetic to the Government's position. But here there was no excuse for the contempt of the grand jury process expressed by the prosecuting attorney.

THE COURT ERRED IN FAILING TO DISMISS THE INDICTMENT BECAUSE OF THE MISCONDUCT OF A GOVERNMENT AGENT, TO WIT: JOHN A. HOUSAND, AND BECAUSE OF THE WILFUL NONDISCLOSURE OF BRADY MATERIAL BY THE PROSECUTING ATTORNEY

A. FACTUAL BACKGROUND:

When the government's witness, John Housand, recanted his trial testimony, the appellants amended their new trial motion to include both his substantive perjury as well as his collateral lies as a basis therefor. They also claimed the nondisclosure of Brady material by the government and amended their prayer for relief by seeking a dismissal of the indictment or in the alternative a new trial. Judge Clarie, after a full hearing, denied the motion to dismiss but granted the motion for a new trial. (See Ruling on Motion for a New Trial, Appendix pp. 317).

At Trials 3 and 4 these appellants reiterated their motions to dismiss based on the misconduct of a government agent to wit: John Housand, and also on the wilful nondisclosure of Brady material by the prosecuting attorney. The motions to dismiss were denied by both Judges Newman and MacMahon.

Regardless of whether or not Housand perjured himself in his substantive testimony at Trials 1 and 2, there can be no doubt that he wilfully perjured himself with regard to his psychiatric history and his use of aliases. When asked if he had ever been examined or treated by a psychiatrist, Housand flatly denied the same. Yet as Judge Clarie said in his Ruling on the New Trial Motion, Housand's psychiatric status and his credibility were crucial to the government's case:

Throughout both trials Housand's credibility was constantly under attack. His testimony was crucial in establishing the meeting on May 8, 1972 at Carter's Jewelry Store in Cranston, Rhode Island, which involved the four defendants as active participants. Without that meeting it would have been difficult, if not impossible to prove that all four had agreed to actively participate in carrying out the plan to do away with LaPolla as set out in Count I of the indictment. It became clear that the realiability of the government informant, as the prosecutor's principal witness, could in the last analysis become finally determinative of the guilt or innocence of these defendants.

Thus it was of critical importance during both trials that Housand flatly denied that he had ever been examined or treated by a psychiatrist, when in fact his actual medical and psychiatric history disclosed objective facts to the contrary. In fact, it became an effective method of closing the door to further cross-examination by defense counsel in the area of his prior mental illness and his potential as a perjurer and embellisher of the truth. (Memorandum of Decision pp. 8-9).

When the truth came out, it was revealed that Housand had been seen by military staff psychiatrists at the U.S. Naval Hospital for a medical-psychiatric evaluation at Guam in 1954. A report of this evaluation, was contained in his court martial records. It disclosed two prior nervous breakdowns with periods of loss of memory under stress. He claimed to have experienced these symptoms since having been accidentally hit on the head with an axe as a child.

His court martial records also disclosed a psychiatric evaluation at the Psychiatric Clinic, Lackland Air Force Base in Texas in 1956. He was again seen by a psychiatrist who set forth his opinion as to his mental status.

Both of these reports came into the possession of the prosecuting attorney during the course of Trial No. 1. The prosecutor acknowledged that he received Housand's court martial records subsequent to Housand's denial of being examined or treated by a psychiatrist (Coffey Transcipt, pp. 36-37). However, it was his claim that he merely "scanned" the court martial material his interest being primarily in reviewing Housand's criminal record. (Coffey Transcript pp. 43-62) The Court found that the failure of the prosecuting attorney to turn this material over to the defense was done through "oversight". (Memorandum of Decision p. 16)

In addition to his military psychiatric evaluation, Housand had voluntarily admitted himself to the Lutheran Medical Center in Omaha, Nebraska for 27 days in 1965. He was treated by Dr. Harry Henderson, a psychiatrist who's discharge summary led off with "this patient has a fantastic ability to lie". He found Housand to have a personality trait disturbance and to be emotially unstable. Neither the government nor the defense had Dr. Henderson's report nor were either aware of Housand's hospitalization at the time of the trial. However the prosecuting attorney acknowledged that he never asked the ATF agents involved in the case to do a check on Housand's psychiatirc background. (Coffey Transcript, pp.33-34).

Housand was also interrogated at length by the defense about his use of certain aliases. While he freely admitted

the use of several aliases, he denied categorically ever using the name "John Levon Housand" or "John L. Housand". Included in the Court martial material in the government's possession were summaries of Housand's military convictions. Part of that record was replete with the name "John L. Housand", including in particular, 10 specifications of forged checks which included the signature "John L. Housand". To these 10 specifications a plea of guilty had been entered by Housand. The prosecutor acknowledged that he looked through the material with an eye toward reviewing the convictions. The Court again found the prosecutor guilty of "negligent oversight" (Memorandum of Decision p. 27)

In his memorandum of decision Judge Clarie found that Housand knew that he had undergone psychiatric treatment and was fully aware that he was a patient. (Memorandum of Decision p. 13). He goes on to find that Housand's "deliberate false denial of past psychiatric examination, evaluation and treatment, effectively foreclosed defense counsel's inquiry into this sensitive area". (Memorandum of Decision p. 24;) With regard to the objective evidence of the 10 checks bearing the name "John L. Housand" the court said that had they been turned over to the defendants "they might have used them to establish a visible benchmark against which the true measure in the courtroom of the witness' false testimony could be guaged." (Memorandum of Decision p.28).

B. THE DOUBLE JEOPARDY CLAUSE AS A BAR TO MULTIPLE TRIALS

The double jeopardy clause is, at the most general level of description, a restriction on government power imposed in recognition

of the numerous practical hardships accompanying a criminal prosecution. To limit the individual's exposure to the rigors of prosecution, the clause carries into effect "a constitutional policy of finality for the defendant's benefit in federal criminal proceedings". United States v. Jorn, 400 U.S. 470, 479 (1971). Thus the double jeopardy clause is more than a protection against twice being punished. It protects in the first instance, against twice enduring even the risk of punishment. Downum v. United States, 372 U.S. 734, 736 (1963); Breed v. Jones, U.S. , 44 L.Ed. 346, 354 (1975). It is not just a defense against a criminal charge, but guarantees freedom from a second prosecution. Fain v. Duff, 488 F. 2d 218 (5th Cir. 1973).

By forbidding successive trials the clause is intended to avert a number of potential evils. From the perspective of its effect on the government, the double jeopardy clause is intended to foreclose the use of the criminal justice system as an avenue of oppression or harrassment. Wade v. Hunter, 336 U.S. 684, 688-9 (1949); Downum v. United States, supra at 736. It serves to effect a balance between the state "with all its resources and power" and the individual. Green v. United States 355 U.S. 184, 187 (1957); Gori v. United States, 387 U.S. 364, 372 (1961) (Douglas dissent); United States ex rel Russo v. Superior Court of New Jersey, 483 F. 2d 7, 12 (3d Cir. 1973), cert. den. 414 U.S. 1023 (1973).

To the individual, liability to successive prosecutions carries with it several consequences, all of which have been recognized by the courts. First there is the financial consequence in the form of attorneys fees and court costs or lost wages.

Howard v. United States, 372 F.2d 294, 299 (9th Cir. 1967). The physical toll which can be exacted by successive prosecutions have also been recognized, Ibid, as well as the psychological stress inherent in being subjected to a "continuing state of anxiety and insecurity". Green v. United States, supra, at 187.

Obviously, the opportunity to try an individual repeatedly enhances the possibility that, although innocent, a defendant may be found guilty. Green v. United States, supra at 188. Price v. Georgia, 398 U.S. 323, 326 (1970). Thus for the government, the double jeopardy clause, requires that its case must succeed or fail on its performance before one jury. Downum v. United States, supra; Gori v. United States, supra at 372 (Douglas dissent). For the individual, the thrust of the clause is to "limit to one the number of times that a defendant may be required to submit proof of his innocence to challenge or acceptance by the other side". United States v. Velasquez, 490 F. 2d 29, 34 (2d Cir. 1973). In summary a defendant ought not be "forced to run the gauntlet more than once on the same charge". Green v. United States, supra at 190.

C. GOVERNMENT MISCONDUCT AS A BAR TO A SECOND PROSECUTION

It is clear that the Double Jeopardy clause bars a retrial of an accused where there has been bad faith conduct by the court or prosecution. In its most recent discussion of the Double Jeopardy Clause, United States v. Dinitz, U.S. , 44 U.S. Law Week 4309, 4312-13 (March 8, 1976), the Supreme Court reiterated its ruling that prosecutorial misconduct will bar a second trial of an accused:

> The Double Jeopardy clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where "bad faith conduct by the judge or prosecutor" threatens the "harassment of an accused by successive prosecution or declarations of a mistrial so as to afford the prosecution a more favorable opportunity to convict the defendant. United States v. Jorn, supra, at 485, Downum v. United States, at 736.

In the present case the appellants contend that there are two levels of prosecutorial misconduct which triggered the Double Jeopardy Clause thereby barring their retrial. The first deals with the wilful perjury of a government agent: John Housand. This misconduct clearly prejudiced the rights of these appellants for their one good shot for an acquittal by the first jury. The second level of misconduct deals with the wilful nondisclosure of Brady material by the prosecutor. This claim utilizes the term willful, not in the malicious sense, but rather in the intellectual sense, i.e. a reasoned decision that certain material was not Brady material which a court later held so to be.

1. JOHN HOUSAND AS A GOVERNMENT AGENT.

The evidence is clear that John Housand was receiving money, special favors, clothing, assistance before state authorities, de facto immunity from prosecution and a new identity in return for his testimony against these defendants. The total payments to Housand over a 16 month period exceeded $5,000. The prosecutor wrote to the North Carolina parole authorities on his behalf. Suits of clothing were purchased for him. He was kept in a so-called "safe house" where the confinement was substantially more lenient than in a jail. He was given a new name, a new

social security number, a new driver's licence, assistance in obtaining a job and a so-called "grub stake" to get started with. All of this was given to him in return for his truthful testimony before a grand jury and at the trial of these defendants. But he lied.

There is no claim that the government suborned his perjury. But he was the government's man. No effort was made by the government to check out his psychiatric history although it was in possession of information that should have alerted the investigating officers that there were problems there. Housand was simply accepted at face value even in the face of some pretty fantastic stories about liasons with the FBI and local law enforcement officials all of which were rebutted.

In Sherman v. United States, 356 U.S. 369, 373 (1958) the government utilized an informant to participate in the purchase of narcotics from the defendant. The informant was not paid by the government but rather he was under criminal charges himself for selling narcotics albeit not yet sentenced. He asked the defendant to help him purchase a small quantity of narcotics which the defendant was initially reluctant to do. The informant persisted and eventually a sale was consumated. At his trial the defendant interposed a defense of entrapment. The governemnt claimed that there was no entrapment by its agents. A federal agent admitted he never bothered to ask the informant about how he made his contact with the defendant. In reversing the conviction the Supreme Court held that the government could not disown its informant and claim no responsibility for his actions:

> Kalchinian (the informant) not only procured a source of narcotics but apparently also induced petitioner to return to the habit. Finally, assured of a catch, Kalchinian informed the authorities so that they could close the net. The Government cannot disown Kalchinian and insist that it is not responsible for his actions. Although he was not being paid Kalchinian was an active government informer who had but recently been the instigator of at least two other prosecutions.
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> * * *
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> In this testimony the federal agent in charge of the case admitted that he never bothered to question Kalchinian about the way he had made contact with petitioner. The Government cannot make use of an informer and then claim disassociation through ignorance.

This is exactly the situation that obtains in the present case. Housand's willful perjury is clear. His perjury went directly to his credibility which was crucial to the Government's case. He was the Government's paid informant. The Government had information that proved he was lying. Yet Housand was never questioned about his psychiatric background nor was it checked out. The Government cannot now disavow the perjury of its agent.

In United States v. Mosley, 496 F. 2d 1012, 1016, n.4 (5th Cir. 1974) the Court of Appeals for the Fifth Circuit specifically held that the acts of an informer are imputed as in concert with the Government, relying on Sherman. Here in the Second Circuit, interestingly enough, the terms "informer" and "special employee" were used interchangeably in United States v. Holiday, 319 F. 2d 775 (2d Cir. 1963).

The appellants respectfully submit that when the Government chooses to rely so heavily on a man such as Housand, it must take the liabilities he brings to a case as well as the benefits. If he is "conning" the government and its agents, they surely have some duty to explore his background. Had they looked into his

background carefully, and learned of his psychiatric history they might not have proceeded to trial at all. Once the trial had begun, had the fact of his perjury been made known to the defense, as Judge Clarie said, "Timely knowledge by defense counsel that the Government's informant and chief witness was described in available psychiatric reports as a compulsive liar is a fact which might well have been crucial to defense counsel's effective cross examination of Housand" (Memorandum of Decision P. 12). Surely under circumstances such as are present herein, the government cannot gainsay the actions of their paid informant. Dismissal as a result of his misconduct was in order.

2. "WILLFUL" NONDISCLOSURE OF BRADY MATERIAL BY THE GOVERNMENT

As has been previously pointed out the prosecuting attorney admitted to having possession of Housand's court martial record which contained references to his psychiatric examinations and to his use of the alias John L. Housand. He also candidly acknowledged that he took a markedly different view of what constituted Brady material from that held by defense counsel (Coffey Transcript pp. 235-236.) He also acknowledged that he read the court martial material focusing on any possible felony convictions rather than on the psychiatric aspects (Ibid p. 207), or the use of a given alias (Ibid pp. 211-225) The Appellants' claim that if a government attorney chooses not to turn over Brady material because he does not believe it so to be, but which a Court later declares to be Brady material, then the only appropriate remedy, in light of the Double Jeopardy Clause, is dismissal.

This may seem to be a harsh result, but it is respectfully submitted that in view of the Supreme Court's recent decision in

Imbler v. Pachtman, U.S. , 44 U.S. Law Week 4750 (March 2, 1976) in which an absolute grant of immunity was given to prosecutors even for the malicious or dishonest use of false evidence no other remedy is available. In that case Justice White attempted to draw a distinction between the wilful use by a prosecutor of perjured testimony and the wilful suppression by him of exculpatory material granting immunity in the latter but not in the former. The majority rejected this concept granting blanket immunity.

If the prosecutor is now immune from a damage claim, where is the defendant left if there is a wilful violation of his rights? What sanction is there consistent with the Double Jeopardy Clause for a violation by the prosecutor of a Court order to turn over Brady material? Cannot the Government consistently refuse to turn over exculpatory material on the mere claim by the prosecutor that he did not consider it exculpatory?

It is respectfully submitted that when a man's liberty lies in the balance the stakes of the game are high. The only logical position consistent with both the constitutional protection against Double Jeopardy and the prosecutor's immunity from prosecution for his own wrongdoing is for a Court to dismiss an indictment in those cases wherein a prosecutor fails to turn over Brady material because he does not think that it is exculpatory. At the very least, in close cases the material should be given to the Court.

The defense has never ascribed malicious motives to the prosecutor in this instance. He undoubtedly was taken in by Housand's perjury as much as everyone else. But when he was in

possession of objective material which would have brought that perjury to light he had a duty to act. His failure to do so was at the government's peril. A new trial should not have been the result. Dismissal of the indictment was in order.

THE COURT ERRED IN FAILING TO GRANT THE APPELLANTS' MOTIONS TO SET ASIDE THE VERDICT AND TO ENTER JUDGMENT OF ACQUITTAL.

In summing up the present posture of this case a review of the ultimate verdicts of the five defendants involved looks as follows:

	MARRAPESE	GUILLETTE	JOOST	ZINNI	BUCCI
COUNT I (conspiring, death penalty	Guilty	Guilty	Guilty	Not Guilty	Not Guilty
COUNT II intimidating a witness	Guilty	Guilty	Not Guilty	Not Guilty	Not Indicted
COUNT III	Guilty	Not Guilty	Not Guilty	Not Guilty	Not Indicted

As of this moment, the only person who stands convicted of all three counts, is William Marapese. He is the only party convicted of actually using an explosive device--and even he says he did not do that. Although he claimed that Guillette "confessed" to having planted the bomb a jury rejected that testimony and acquitted Guillette of the substantive offense.

In order to convict either Joost or Guillette of conspiracy to violate the civil rights of Daniel LaPolla, death resulting, the burden was on the Government to show beyond a reasonable doubt that either of the five named defendants or an agent acting at the direction of one or more of them actually planted the bomb that killed LaPolla. On the evidence presented to the jury, the Government failed to do that.

The only conspiracy proven; if Marrapese is to be believed, was that of May 8, 1972 when these men allegedly hired John Housand to kill LaPolla for Five Thousand Dollars ($5,000.00). However. the evidence is clear that this plan was never consumated. Marapese says he called it off the next day. All of the other conspirators were advised that the plan to have Housand kill LaPolla was off and they consented. Indeed Housand left the state and was in jail when LaPolla died.

Marrapese then vaguely claims that an alternative plan to bribe or beat LaPolla was formulated. He cannot say when, where or in what words this plan was agreed to. He says that he was the only one who was to contribute to the bribery scheme and that no definite plans were worked out about beating LaPolla. No other evidence was offered to tie these appellants to the death of LaPolla.

What about the Armando's Restaurant conversation? That ties Guillette and Sitko to the death since it was a confession that they did it. But the jury rejected that by acquitting Guillette. The Government even rejected it by failing to indict Sitko. In addition, since the jury in Trial No. 3 acquitted Bucci outright it must have rejected the theory that the conspiracy of which he was allegedly a part resulted in the death of LaPolla.

Interestingly enough, the defense tried to offer evidence which would have supplied the necessary link of proving that an agent of one or more of the co-conspirators killed LaPolla. The defense tried to offer the so-called Souca evidence to show that Anthony Souca, hired by Marrrapese, actually killed LaPolla. However, the Government objected and the Court would not let the

jury hear about Anthony Souca. The defense was aware that the Souca evidence was a two edged sword but strove mightily to get it in. The Government and the Court rejected it.

Consequently, insofar as Court I charges, a conspiracy, death resulting, there is a gap in the proof. There is absolutely no evidence linking the death of LaPolla to the conspiracy proven against these defendants. For that reason so much of the verdict as finds them guilty of conspiracy, death resulting, should be set aside.

The result of letting this aspect of the verdict stand is to permit what appellants call a "lawless verdict". Ninety-nine out of one hundred persons who listen to William Marrapese would come to the conclusion that he is a liar. But ask those same 100 people if they think Joost and Guillette are guilty and they will say yes. After all, they went to the wake and were flying around in airplanes and they are not very nice fellows. The only evidence of the conspiracy came from a liar. But a jury can and did take the bit in its teeth and convict these defendants anyway. Surely there must be a greater burden on the Government to fill in the gaps in proof than was done here.

As to Count II of which Guillette stands convicted, the record is devoid of any evidence whatsoever that Guillette did "in the District of Connecticut" willfully and knowingly "by force and violence" intimidate Daniel LaPolla. Obviously, the gravamen of Count II is the same as Count III, ie. the actual planting of the bomb which killed LaPolla. The Government is not

claiming the visit to the wake constituted evidence of this offense since that occurred in Rhode Island, not the District of Connecticut. The only time Guillette came into Connecticut was for the airplane rides and then he was not successful in locating LaPolla. Where is the force and violence?

What about the Armando's Restaurant conversation? Does not that prove that Guillette came to Connecticut and planted the bomb? That argument might have merit had the jury convicted him of Count III. But having acquitted Guillette of that Count the jury could not lawfully convict him of Count II without some evidence of intimidation by force or violence in Connecticut by Guillette. There simply was no such evidence in any of the trials. Therefore, the verdict of guilty on Count II against Mr. Guillette should have been set aside.

THE COURT LACKED JURISDICTION OF COUNT I

Count I charged appellants with violating the civil rights of Daniel LaPolla in violation of 18 U.S.C. Sec. 241. The civil right violated, claimed the Government, was the right of LaPolla to be a witness in a criminal proceeding. We contended below and contend here that this is not a right protected by Section 241. This Court has rejected an identical argument in United States v. Pacelli, 491 F.2d 1108 (2d Cir. 1974) which is on petition for certiorari to the Supreme Court. The arguments of Pacelli's counsel to this court are adopted herein.

CONCLUSION

Based upon the foregoing appellants respectfully request this Court to DISMISS THE INDICTMENT OR ORDER A NEW TRIAL.

THE DEFENDANT
DAVID GUILLETTE

BY Hubert J. Santos

Hubert J. Santos
Special Public Defender
51 Russ Street
Hartford, Connecticut

Attorney for David Guillette

THE DEFENDANT
ROBERT JOOST

BY James A. Wade

James A. Wade
Special Public Defender
799 Main Street
Hartford, Connecticut

Attorney for Robert Joost

CERTIFICATION

This is to certify that a copy of the Appellants' joint brief and appendix was delivered this 29th day of April, 1976 to Special Attorney for the Justice Department, Paul Coffey.

Hubert J. Santos

James A. Wade